TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 538.

ALONZO BAILEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED SEPTEMBER 10, 1906.

(21,334)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1908.

1 THE STATE OF ALABAMA, *Montgomery County*

Be it remembered that at a term of the City Court of Montgomery, begun and holden for said county, at the Court House in the City of Montgomery, State and County aforesaid, on the First Monday in February in the year of our Lord One Thousand Nine Hundred and Eight, it being the third (3rd) day of said month—present the Honorable W. H. Thomas, Associate Judge Presiding in the Criminal Division of said Court—the following proceedings were had and the following judgments were rendered, to-wit:

Ex Parte ALONZO BAILEY.

To Hon. W. H. Thomas, Judge of the City Court of Montgomery:

Your petitioner, Alonzo Bailey, respectfully shows unto your Honor that he is imprisoned in the jail of Montgomery County, Alabama, and the cause or pretense of such imprisonment is a commitment issued by B. C. Young, Esq., Justice of Peace of Montgomery County, Alabama, a copy of which commitment is hereunto attached, marked Exhibit A, and made a part of this petition as fully as if set out herein.

The premises considered, your petitioner prays that your Honor issue a writ of *habeas corpus* to the said Horace Hood commanding him to bring the body of your petitioner before your Honor at a time and place to be fixed by your Honor, together with the cause of detention of petitioner, and that upon a hearing of said petition, your Honor will make an order discharging your petitioner from the custody of said Horace Hood.

ALONZO BAILEY.

Sworn to and subscribed before me this 14th day of April, 1908.

J. T. LETCHER,
Notary Public, Montgomery County, Alabama.

2 EXHIBIT A.

STATE OF ALABAMA, *Montgomery County:*

To the Jailor of said County:

On the examination of Alonzo Bailey charged with the offense of obtaining fifteen dollars ($15.00) under a contract in writing, with intent to injure or defraud his employer, it appearing that such offense has been committed, and that there is sufficient cause to believe that he has been guilty thereof, you are therefore commanded to receive him into your custody, and detain him until he is legally discharged.

Dated this 6th day of April, 1908.

B. C. YOUNG,
Justice of the Peace.

STATE OF ALABAMA, *Montgomery County:*

To the Sheriff of said County:

You are hereby commanded to have the body of Alonzo Bailey alleged to be detained by you by whatsoever name the said Alonzo Bailey is called or charged with the cause of such detention before me, W. H. Thomas, Associate Judge at 10 o'clock April 18, 1908, to do and receive what shall then and there be considered concerning the said Alonzo Bailey.

Dated this the 15th day of April 1908.

W. H. THOMAS,
Judge of the City Court.

Executed the within writ by bringing the within named Alonzo Bailey before Hon. W. H. Thomas, Associate Judge City Court of Montgomery, with the cause of his detention, viz: A commitment issued by B. C. Young, Justice of Peace, which commitment is hereto attached and made a part hereof. April 18, 1908.

HORACE HOOD,
Sheriff Montgomery County.

Petition denied. Defendant held in $150.00 bail.
April 18, 1908.

W. H. THOMAS, *Judge.*

3 Be it remembered that in the matter of the petition of Alonzo Bailey for a writ of *habeas corpus*, and on the hearing of such petition and writ before Hon. W. H. Thomas, Judge of the City Court of Montgomery, the following proceedings were had:

Ex Parte ALONZO BAILEY.

To Hon. W. H. Thomas, Judge of the City Court of Montgomery:

Your petitioner, Alonzo Bailey, respectfully shows unto your Honor that he is imprisoned in the jail of Montgomery County Alabama, and the cause or pretense of such imprisonment is a commitment issued by B. C. Young, Esq. Justice of Peace of Montgomery County, Alabama, a copy of which commitment is hereunto attached, marked Exhibit A, and made a part of this petition as fully as if set out herein.

The premises considered, your petitioner prays that your Honor issue a writ of *habeas corpus* to the said Horace Hood commanding him to bring the body of your petitioner before your Honor at a time and place to be fixed by your Honor, together with the cause of detention of petitioner, and that upon a hearing of said petition, your Honor will make an order discharging your petitioner from the custody of said Horace Hood.

ALONZO BAILEY.

Sworn to and subscribed before me this the 14th day of April, 1908.

J. T. LETCHER,
Notary Public, Montgomery County, Alabama.

EXHIBIT A.

STATE OF ALABAMA, *Montgomery County:*

To the Jailor of said County:

On the examination of Alonzo Bailey charged with the offense of obtaining fifteen dollars ($15.00) under a contract in writing,
4 with intent to injure or defraud his employer it appearing that such offense has been committed, and that there is sufficient cause to believe that he has been guilty thereof, you are therefore commanded to receive him into your custody, and detain him until he is legally discharged.

Dated this 6th day of April 1908.

B. C. YOUNG,
Justice of the Peace.

Whereupon Hon. W. H. Thomas issued the following writ to-wit:

STATE OF ALABAMA, *Montgomery County:*

To the Sheriff of said County:

You are hereby commanded to have the body of Alonzo Bailey alleged to be detained by you by whatsoever name the said Alonzo Bailey is called or charged with the cause of such detention before me, W. H. Thomas, Associate Judge at 10 o'clock April 18, 1908, to do and receive what shall then and there be considered concerning the said Alonzo Bailey.

Dated this the 15th day of April 1908.

W. H. THOMAS,
Judge of the City Court.

Which writ was returned with the following endorsement, viz:

Executed the within writ by bringing the within named Alonzo Bailey before Hon. W. H. Thomas, Associate Judge City Court of Montgomery, with the cause of his detention, viz: A commitment issued by B. C. Young Justice of Peace, which commitment is hereto attached and made a part hereof, April 18, 1908.

HORACE HOOD,
Sheriff Montgomery County.

Thereupon, it being the time and place fixed for the hearing of the petition and writ, Hon. W. H. Thomas, Associate Judge City Court Montgomery present and presiding: W. T. Seibels, Deputy Solicitor, and Horace Hood, Sheriff, with Alonzo Bailey being also present, proceedings were had as follows, viz:

5 It was admitted by the petitioner, Alonzo Bailey, and the State that only one witness H. C. Borden, was examined on the preliminary trial of said Alonzo Bailey before B. C. Young Justice of Peace, and that the said Borden testified as follows:

That he was the Manager of the Riverside Company, a corporation, that on or about the 26th day of December, 1907, the Riverside

Company and Alonzo Bailey entered into a contract in writing which contract reads as follows:

STATE OF ALABAMA, *Montgomery County:*

Know all men by these presents: That it is hereby agreed by and between the Riverside Company, a corporation, and Alonzo Bailey, both of Montgomery County, Alabama, as follows, to-wit:

That, I, Alonzo Bailey, for and in consideration of the sum of Fifteen Dollars in money, this day in hand paid to me by said Riverside Company, the receipt whereof I do hereby acknowledge, I the said Alonzo Bailey do hereby consent, contract and agree to work and labor for the Riverside Company as a farm hand on their Scott's Bend Place in Montgomery County, Alabama, from the 30th day of Dec. 1907, to the 30th day of Dec. 1908, at and for the sum of $12.00 per month.

And the said Alonzo Bailey agrees to render respectful and faithful service to the Riverside Company and to perform diligently and actively all work pertaining to such employment, in accordance with the instructions of the said Riverside Company or agent.

And the Riverside Company in consideration of the agreement above mentioned of the said Alonzo Bailey hereby employs the said Alonzo Bailey as such farm hand, for the time above set out, and agrees to pay the said Alonzo Bailey the sum of $10.75 dollars per month.

Witness our hand- and seal- this the 26th day of December, 907.

ALONZO BAILEY. [L. S.]
THE RIVERSIDE CO., [L. S.]
Per H. C. BORDEN, *Mgr.*

6 The above contract was introduced in evidence and witness further testified that Alonzo Bailey had obtained from the Riverside Co. at the time of entering into the contract $15.00; that the said Alonzo Bailey had worked for the Riverside Company during the month of January 1908, and three or four days in February, 1908, and since that time Alonzo Bailey had not performed any service for the Riverside Company, in accordance with the said contract; that the said Alonzo Bailey had not refunded the said $15.00 to the said Riverside Co. and was at present indebted to the Riverside Co. in the sum of about $20.00. The same being the $15.00 obtained by defendant of the employer Company at the time of execution of contract and advances made him over and above the value of the labor he did perform under the contract, and that witness for the Riverside Co., or its authorized agents had given the petitioner just cause for quit-ing the said service or failure — such contract. It was agreed between Alonzo Bailey and State of Alabama that this was all the evidence introduced on the preliminary trial and that H. C. Borden, who was present at the *habeas corpus* proceeding, would testify to the above facts on the said proceeding. And all of said above facts be taken as the evidence in this case. That it was all done in Montgomery County, Alabama.

Thereupon Alonzo Bailey, by his attorneys, made the following motion:

Ex Parte ALONZO BAILEY.

Comes Alonzo Bailey, by his attorneys, and moves the Hon. W. H. Thomas, to discharge him from the custody of Hon. Horace Hood, Sheriff of Montgomery County, Alabama, on the following grounds, towit:

1. The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the Contract.

2. The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

3. The act entitled an act to amend Section 4730 of the Criminal Code of 1896 approved October 1, 1903, as amended
7 by an act entitled an act to amend an act to amend Section 4730 of the Criminal Code of 1896, approved October 1, 1903; approved Aug. 15, 1907, is unconstitutional and void in that it provides that the refusal or failure of any person who enters into such contract, etc. shall be *prima facie* evidence of the intent to injure or defraud his employer, and the effect of such provision is to deprive defendant of his liberty without due process of law in violation of Section 6 of the Constitution of the State of Alabama.

4. Said act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall make or enforce any law which will deprive any person of life, liberty or property without due process of law.

6. Said act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the — United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

7. Said act is unconstitutional and void in that its effect is to subject the defendant to involuntary servitude not as a punishment for any crime, in violation of the Thirteenth Amendment of the Constitution of the United States.

8. Said act makes the failure or refusal to perform the services under the contract *prima facie* evidence of only one intent.

9. Because it cannot be determined from said act whether the failure or refusal to perform services is *prima facie* evidence of the intent at the time of entering into the contract or at the time of the failure or refusal to perform the services.

WATTS & LETCHER,
Attorneys for Petitioner.

The Judge overruled said motion, to which ruling of the Judge Alonzo Bailey then and there duly and legally excepted.

The following order was then endorsed on the petition of said Alonzo Bailey.

Petition denied. Defendant held in $150.00 bail.

April 18, 1908.

W. H. THOMAS, *Judge.*

The insistence was overturned and the statute was held not to be unconstitutional—the Court, as the basis of the ruling, again pointing out the fact that "a mere breach of contract is not by the statute made a crime," but that the criminal feature consists in the intent to injure or defraud.

This *intent to injure or defraud* marks the line of cleavage between the statute in judgment and the one approved March 1st, 1901 (Acts, 1900-1, p. 1208), which made it a misdemeanor for any person who had contracted in writing to labor for, or serve, another for any given time, etc., and who, before the expiration of such contract, and without the consent of the other party, and without sufficient excuse (to be judged by the court), shall leave such other party, etc. This last statute was, by Judge Jones, of the Federal Court, held to be obnoxious to the State Constitution (123 Fed. Rep. 671); and was by this Court held to be unconstitutional, in *Toney's Case*
12 (141 Ala. 120), because of the restrictions it attempts to place on the right to make contracts. These two cases are now urged as authority in support of the insistence of appellant that the statute under consideration is violative of the Constitution, and we are asked to overrule the *Vann Case, supra.*

While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet when the individual enters into a contract, with the intention to perpetrate a fraud, it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract, with such intent, and obtaining money or other personal property through such agency.

This is all that is effectuated by the legislation in question. On its face, the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional.

Without further extension of the argument, we not only decline to depart from the ruling made in *Vann's Case,* on this subject, but reaffirm it.—*Banks v. State,* 2 L. R. A. (N. S.), 1007.

In *Ex parte Riley* (94 Ala. 82, 83) it was said: "As the intent is the design, purpose, resolve or determination in the mind of the accused, it can rarely be proven by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations or suspicions as to the intentions which were not disclosed by any visible or tangible act, expression or circumstance."

It is no doubt true that the difficulty in proving the intent, made patent by that decision, suggested the amendment of 1903, to the statute, which provides that the refusal or failure of a person who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be *prima facie* evidence of the intent to injure or defraud his employer.

This amendment has twice been declared by this Court to be a

constitutional enactment.—Thomas's Case, 144 Ala. 77; Vann's Case, 43 So. Rep. 357. However, these cases are here assailed, and the conclusions reached therein are vigorously ugated in brief of appellant's counsel. A re-examination of those ses, together with the consideration of others, has not only not aken our faith in the correctness of the conclusion there reached, t confirmed it; and we decline to recede therefrom.—*Banks v. ate*, 2 L. R. A. 1007.

We have discussed all questions presented by the record, and con- ude that there is no error shown.

The order appealed from is affirmed.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

Minutes of the Supreme Court of Alabama.

November Term, 1907—June 4th, 1908.

3 Div., 793.

ALONZO BAILEY
vs.
THE STATE OF ALABAMA.

peal from Order and Judgment of the Judge of City Court of Montgomery.

Come the parties by attorneys, and the record and matters therein signed for errors, being submitted on briefs, and duly examined d understood by the court, it is considered that in the record and oceedings of the City Court there is no error. It is therefore con- dered that the judgment and order of the Judge of the City Court in all things affirmed. It is also considered that the Appellant y the costs of appeal of this Court and of the City Court.

THE STATE OF ALABAMA, *County of Montgomery:*

I, Robert F. Ligon, Clerk of the Supreme Court of the State of abama, by virtue of the annexed writ of error, and in obedience reto, do hereby certify that the foregoing 14 pages, contain a true, nplete and correct transcript of the record and proceedings had in d court, in the case of Alonzo Bailey *vs.* The State of Alabama, as same remains of record and on file in this office.

In testimony whereof I have caused the seal of said Court to be ixed, at the Capitol, in the City of Montgomery, County of Mont- mery and State of Alabama, on this the 8 day of September, 1908.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

16 UNITED STATES OF AMERICA,
State of Alabama:

In the Supreme Court of Alabama.

ALONZO BAILEY, Petitioner, Appellant,
vs.
THE STATE OF ALABAMA, Defendant, Appellee.

Petition for Writ of Error.

To the Honorable Judges of the Supreme Court of the State of Alabama:

Your petitioner, Alonzo Bailey, a citizen of the United States of America and of the State of Alabama, respectfully shows that on the 30th day of June, 1908, this Honorable Court rendered judgment against petitioner in a certain cause wherein your petitioner, the said Alonzo Bailey, was appellant and the said The State of Alabama, was appellee, whereby your petitioner is deprived of his liberty, and remended to the custody of Horace Hood as Sheriff of Montgomery County, Alabama, by whom he is now detained and imprisoned in the County jail of said county to whom he was committed by B. C. Young, Justice of the Peace, by a writ of commitment directed to the jailor of said County and dated April 6, 1908, as will appear by reference to the record and proceedings in said cause; that the said Supreme Court of Alabama is the highest Court in the State of Alabama in which decision of said proceedings could be had; that the said proceeding was commenced by the said Alonzo Bailey, Petitioner-Appellant, before Honorable William H. Thomas, Associate Judge of the City Court of Montgomery, Montgomery County, Alabama, by a writ of *habeas corpus* to Horace Hood, as Sheriff of Montgomery County, Alabama, directing him to have the body of petitioner before the said Honorable Judge; that said defendant having brought petitioner, as aforesaid, before the said Hon-
17 orable Judge, your petitioner moved the said Honorable William H. Thomas, Associate Judge of the City Court of Montgomery, Montgomery County, Alabama, to make an order discharging him from the custody of the said Horace Hood, as Sheriff of Montgomery County, Alabama, upon the following grounds which will appear by a reference to the transcript of record and proceedings in this cause, towit:

First (1). The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the contract.

Second (2). The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

Third (3). The act entitled an act to amend Section 4730 of the Criminal Code of 1896 approved October 1, 1903, as amended by an act entitled an act to amend an act to amend Section 4730 of the Criminal Code of 1896, approved October 1, 1903; approved Aug.

, 1907, is unconstitutional and void in that it provides that the re-
sal or failure of any person who enters into such contract, etc., shall
prima facie evidence of the intent to injure or defraud his em-
oyer, and the effect of such provision is to deprive defendant of his
erty without due process of law in violation of Section 6 of the
nstitution of the State of Alabama.

Fourth (4). Said act is unconstitutional and void in that it vio-
es that part of the Fourteenth Amendment of the Constitution of
United States which provides that no state shall make or enforce
y law which will deprive any person of life, liberty or property
thout due process of law.

Fifth (*6*). That the said act is unconstitutional and void in that
violates that part of the Fourteenth Amendment of the Constitu-
n of the United States which provides that no state shall deny to
y person within its jurisdiction the equal protection of the
laws.

Sixth (*7*). That said Act is unconstitutional and void in
that its effect is to subject the petitioner to involuntary servi-
le not as a punishment for a crime, in violation of the Thirteenth
nendment of the Constitution of the United States.

Wherefore your petitioner is aggrieved and prays for a writ of
ror with citation and supersedeas, returnable to the Supreme Court
the United States, and prays that the said writ of error be allowed
d that a transcript of record and proceedings in the above stated
use, including the said final judgment therein, duly authenticated,
ay be sent to the said Supreme Court of the United States as pro-
ded by law, and that such other and further proceedings may be
d as may be proper in the premises; and also prays that an order
made fixing the amount of security which your petitioner shall
ve and furnish upon the said writ of error; and upon the giving of
ch security all further proceedings in this Court be suspended and
yed until the determination of the writ of error by the Supreme
urt of the United States.

In duty bound, the petitioner will ever pray, etc.

ALONZO BAILEY, *Petitioner,*
By EDW. S. WATTS,
Attorney for Petitioner.

Presented this the 18 day of August, 1908.

JNO. R. TYSON,
Chief Justice of the Supreme Court of Alabama.

19 Supreme Court of Alabama.

Filed August 18th, 1908.

ROBERT F. LIGON, *Clerk.*

In the Supreme Court of Alabama.

ALONZO BAILEY, Petitioner, Appellant,

vs.

THE STATE OF ALABAMA, Defendant, Appellee.

Order Granting Writ of Error.

On this the 18th day of August, 1908, came the petitioner-appellant, by his attorney, in due time, and filed herein, and presented to the court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Honorable, the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the security being now offered by petitioner-appellant, and approved, the said petition has this day been duly allowed, and it is, therefore, ordered that upon the filing of said bond with the clerk of this court in the sum of seven hundred dollars, it shall operate as a supersedeas, and all other and further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

Dated this the 18th day of August, 1908.

JNO. R. TYSON,

Chief Justice of the Supreme Court of Alabama.

20 Supreme Court of Alabama.

Filed August 18, 1908.

ROBERT F. LIGON, *Clerk.*

In the Supreme Court of Alabama.

ALONZO BAILEY, Petitioner, Appellant,

vs.

THE STATE OF ALABAMA, Defendant, Appellee.

I, John R. Tyson, Chief Justice of the Supreme Court of the State of Alabama, presiding therein at the present time and upon the argument, hearing and decision of the above entitled cause in said court, do hereby certify that upon the hearing of the said cause, the petitioner-appellant, Alonzo Bailey (petitioner in the court below), who was then and is now a citizen of the State of Alabama, and of the United States of America, relied for his grounds of defense upon the following:

First (1). The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the contract.

Second (2). The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

Third (3). The act entitled an act to amend Section 4730 of the Criminal Code of 1896 approved October 1, 1903, as amended by an act entitled an act to amend an act to amend Section 4730 of the Criminal Code of 1896, approved October 1, 1903, approved Aug. 15, 1907, is unconstitutional and void in that it provides that the refusal or failure of any person who enters into such contract, etc. shall be *prima facie* evidence of the intent to injure or defraud his employer, and the effect of such provision is to deprive defendant of his liberty without due process of law in violation of Section 6 of the Constitution of the State of Alabama.

Fourth (4). Said act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall make or enforce any law which will deprive any person of life, liberty or property without due process of law.

Fifth (6). That the said Act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Sixth (7). That said Act is unconstitutional and void in that its effect is to subject the petitioner to involuntary servitude not as a punishment for a crime, in violation of the Thirteenth Amendment of the Constitution of the United States.

That the said grounds for defense were presented to and passed upon by the Honorable William H. Thomas, Associate Judge of the City Court of Montgomery, and were held by him not to entitle petitioner to relief, as will be shown by the records; that the said Supreme Court of Alabama was moved by the said petitioner-appellant to discharge him upon the said grounds, and that the said Supreme Court of Alabama affirmed the judgment of the City Court of Montgomery, and entered a judgment denying said writ, as will be shown by the records in said cause in said Court.

And I further certify that the said Supreme Court of Alabama, in which judgment was rendered against the said petitioner-appellant, is the highest court in which a decision in said cause could be had in the State of Alabama.

Signed this the 18th day of August, 1908.

JNO. R. TYSON,

Chief Justice of the Supreme Court of Alabama.

22 UNITED STATES OF AMERICA:

In the Supreme Court, —— Term, 1908.

ALONZO BAILEY, Petitioner, Appellant,
vs.
THE STATE OF ALABAMA, Defendant, Appellee.

And, afterwards, towit, on the — day of —, 1908, before the Justices of the Supreme Court at the Capitol in the city of Washington, comes Alonzo Bailey, petitioner in error, by his attorney, Edw. S. Watts, and says that in the record and proceedings in the above stated cause, there is manifest error in the particulars following, towit:

I. The said Supreme Court of Alabama erred in affirming the action of the court below.

II. The said Supreme Court of Alabama erred in not reversing the action of the court below and directing the discharge of the petitioner in error.

III. The said Supreme Court of the State of Alabama erred in refusing to hold that the following grounds upon which the petitioner in error moved the court to discharge him, entitled petitioner to relief, towit:

First (1). The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the contract.

Second (2). The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

Third (3). The act entitled an act to amend Section 4730 of the Criminal Code of 1896 approved October 1, 1903, as amended by an act entitled an act to amend an act to amend Section 4730 of the Criminal Code of 1896, approved October 1st, 1903; approved Aug. 15, 1907, is unconstitutional and void in that it provides that the refusal or failure of any person who enters into such contract,
23 etc. shall be *prima facie* evidence of the intent to injure or defraud his employer, and the effect of such provision is to deprive defendant of his liberty without due process of law in violation of Section 6 of the Constitution of the State of Alabama.

Fourth (4). Said act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall make or enforce any law which will deprive any person of life, liberty or property without due process of law.

Fifth (6). That the said Act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Sixth (7). That said Act is unconstitutional and void in that its effect is to subject the petitioner to involuntary servitude not as a punishment for a crime, in violation of the Thirteenth Amendment of the Constitution of the States.

Whereas, by the law of the land, the said judgment ought to have been given for the said Alonzo Bailey against the said The State of Alabama, and the said Alonzo Bailey prays the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that a judgment may be here entered discharging petitioner-in-error from the custody of said defendant-in-error, and said Horace Hood, Sheriff — Montgomery County, Ala., and that he may be restored to all things which he has lost by the occasion of said judgment, etc.

EDW. S. WATTS,
Attorney for Alonzo Bailey, Petitioner in Error.

Presented this 18th day of August, 1908.

JNO. R. TYSON,
Chief Justice Supreme Court of Alabama.

24 ALONZO BAILEY, Petitioner in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Alabama, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, being the highest court of law of said State in which a decision could be had in said suit between Alonzo Bailey petitioner-appellant and The State of Alabama, as defendant-appellee, and wherein judgment was in favor of said appellee, in said court on the 30th day of June, A. D. 1908, against the said petitioner-appellant, in which said suit the petitioner-appellant moved the court to discharge him from the custody of said defendant-appellee upon the following grounds, towit:

First (1). The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the contract.

Second (2). The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

Third (3). The act entitled an act to amend Section 4730 of the Criminal Code of 1896 approved October 1, 1903, as amended by an act entitled an act to amend an act to amend Section 4730 of the Criminal Code of 1896, approved October 1, 1903; approved Aug. 15, 1907, is unconstitutional and void in that it provides that the refusal or failure of any person who enters into such contract, etc. shall be *prima facie* evidence of the intent to injure or defraud his employer, and the effect of such provision is to deprive defendant of his liberty without due process of law in violation of Section 6 of the Constitution of the State of Alabama.

25 Fourth (4). The Act entitled "An Act to amend Section 4730 of the Criminal Code of 1896," approved October 1st,

1903, as amended by an Act entitled "An Act to amend an Act to amend Section 4730 of the Criminal Code of 1896," approved October 1st, 1903, approved August 15th, 1907, (which is the statute and authority under which your petitioner is detained), is unconstitutional and void in that it violates that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law.

Fifth (6). That the said Act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Sixth (7). That said Act is unconstitutional and void in that its effect is to subject the petitioner to involuntary servitude not as a punishment for a crime, in violation of the Thirteenth Amendment of the Constitution of the United States.

And whereby it is claimed that said decision of the said Supreme Court of Alabama is contrary to, and in conflict with, the Constitution of the United States as aforesaid, to the great damage of the said Alonzo Bailey, as by his petition of error appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties as aforesaid in this behalf, do command you if judgment herein be given, that then, under your seal distinctly and openly, you send the record and the proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same in Washington on the — day of —, next, in the said Supreme Court to be then and there held, that the record of the proceedings aforesaid being inspected, the Supreme Court may cause fur-
26 ther to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this the 19th day of August in the year of our Lord One Thousand Nine Hundred and Eight.

Witness also my official signature and the seal of the United States Circuit Court for the Middle District of Alabama, this the day and year aforesaid.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk of the United States Circuit Court
for the Middle District of Alabama.

Allowed by

JNO. R. TYSON,
Chief Justice Supreme Court of Alabama.

27 Copy.

ALONZO BAILEY, Petitioner in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

Know all men by these presents: That we, Alonzo Bailey, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto The State of Alabama, in the full and just sum of seven hundred dollars, to be paid to the said The State of Alabama; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of August, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a term of the Supreme Court of Alabama, in a suit depending in said Court, between said Alonzo Bailey as petitioner-appellant, and said The State of Alabama, as defendant-appellee, a judgment was rendered against the said Alonzo Bailey and the said Alonzo Bailey having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The State of Alabama citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Alonzo Bailey shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALONZO BAILEY. [SEAL.]
AMERICAN SURETY CO. OF NEW YORK,
By MICHAEL CODY,
Resident Vice-President.

Attest:
FRED S. BALL,
Resident Assistant Secretary.

Sealed and delivered in presence of
J. T. LETCHER, as to Alonzo Bailey.

Approved by
JNO. R. TYSON,
Chief Justice Supreme Court of Alabama.

28 THE STATE OF ALABAMA, *County of Montgomery:*

I, Robert F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the record and proceedings in said cause, duly certified and authenticated according to law, to The Honorable Supreme Court of the United States.

In testimony whereof I have caused the seal of said Court to be hereunto affixed, at the Capitol, in the City of Montgomery, County of Montgomery, and State of Alabama, on this the 8 day of September 1908.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

29 UNITED STATES OF AMERICA, *ss:*

To the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Alabama wherein Alonzo Bailey is petitioner-in-error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John R. Tyson, Chief Justice of the Supreme Court of the State of Alabama, this 18th day of August, in the year of our Lord one thousand nine hundred and eight.

JNO. R. TYSON,
Chief Justice of the Supreme Court of the State of Alabama.

I, Alex M. Garber, Attorney General of the State of Alabama, defendant-in-error in the said cause of Alonzo Bailey, plaintiff-in-error, *vs.* The State of Alabama, defendant-in-error, hereby accept due personal service of the foregoing citation on this the 19 day of August, 1908.

ALEX M. GARBER,
Attorney General of the State of Alabama.

Endorsed on cover: File No. 21334. Alabama supreme court. Term No. 538. Alonzo Bailey, plaintiff in error, *vs.* The State of Alabama. Filed September 19, 1908. File No. 21334.

Office Supreme Court, U. S.
FILED.
NOV 3 1908
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1908.

No. 538.

ALONZO BAILEY, *Plaintiff in Error.*

vs.

THE STATE OF ALABAMA.

BRIEF OF EDW. S. WATTS, FOR PLAINTIFF IN ERROR.

TROY, WATTS & LEVERETT,
Montgomery, Ala.
Of Counsel.

The Brown Printing Co., Montgomery, Ala.

that on the examination of the said Bailey he was charged with obtaining fifteen dollars by entering into a contract in writing with intent to injure or defraud his employer and directed that said petitioner be held for trial in the City Court of Montgomery. (Record, p. 1).

On the hearing before Hon. W. H. Thomas, Judge of the City Court of Montgomery, it was admitted that only one witness was examined on the preliminary trial; that the said witness was the general manager of the employer; that he testified to the execution of the contract (which was to render personal service for one year) and to the receipt of a consideration therefor; that said Bailey performed satisfactory service under said contract for more than one month; and that without returning the consideration and while otherwise indebted to the said employer, without being given "just cause" failed or refused to perform all of the services required by the said contract. The witness did not testify as to any bad faith or fraud on the part of the said plaintiff in error. (Record, p. 3-4).

On the hearing of the said writ, the said plaintiff in error moved the Hon. W. H. Thomas, Judge of the City Court of Montgomery, to discharge him from the custody of said Sheriff upon the grounds herein shown in the Third Specification of Error. (p. 4.) (Record, p. 5).

The said W. H. Thomas, Judge of the City Court of Montgomery, denied the petition and stated that he was bound by the recent ruling, of the Supreme Court of Alabama, in Thomas vs. State, 144 Ala. 77, and in Vann vs. State, 43 So. 357. Thereupon the plaintiff in error appealed to the Supreme Court of Alabama.

The statute upon which the Court acted was Section 4730 of the Code of Alabama, (1896) as amended.

The said section before the amendment was as follows:

"4730 (3812). SAME: UNDER CONTRACT FOR PERFORMANCE OF ACT OR SERVICE.—Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and, with like intent, and without just cause, and without refunding such money, or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it."

The said Section 4730 was amended by the General Acts of 1903, page 345, so as to read as follows:

"Section 4730. Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service; and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses *or fails* to perform such act or service, must on conviction be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

The said amended statute was further amended by the General Acts of 1907, page 636, so as to read as follows:

"Section 4730. Any person, who, with intend to injure or defraud his employer, enters into a contract in writing for the performance of any act or

service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished *by a fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured; and any person, who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the injured party.* And the refusal or failure of any person, who enters into such contract, to perform such act or service or *to cultivate such land*, or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*"

SPECIFICATION OF ERRORS.

I. The said Supreme Court of Alabama erred in affirming the action of the court below.

II. The said Supreme Court of Alabama erred in not reversing the action of the court below and directing the discharge of the plaintiff in error.

III. The said Supreme Court of the State of Alabama erred in refusing to hold that the following grounds upon which the plaintiff in error moved the court to discharge him, entitled plaintiff to relief, (Record, p. 5), to-wit:

First (1). The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the contract.

Second (2). The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

Third (3). The act entitled an act to amend Section 4730 of the Criminal Code of 1896 approved October 1, 1903, as amended by an act entitled an act to amend an act to amend Section 4730 of the Criminal Code of 1896, approved October 1st, 1903; approved Aug. 15, 1907, is unconstitutional and void in that it provides that the refusal or failure of any person who enters into such contract, etc., shall be *prima facie evidence* of the intent to injure or defraud his employer, and the effect of such provision is to deprive defendant of his liberty without due process of law in violation of Section 6 of the Constitution of the State of Alabama.

Fourth (4). Said act is unconstitutional and void in that it violates that part of the Fourteenth amendment of the Constitution of the United States which provides that no state shall make or enforce any law which will deprive any person of life, liberty or property without due process of law.

Fifth (6). That the said act is unconstitutional and void in that it violates that part of the Fourteenth amendment of the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Sixth (7). That said act is unconstitutional and void in that its effect is to subject the plaintiff to involuntary servitude not as a punishment for a crime, in violation of the Thirteenth amendment of the Constitution of the United States. (Record, p. 14).

INTRODUCTION.

This case presents a question of liberty; a question which involves directly or indirectly the liberty or rights of thousands of citizens. It is a question involving specifically the liberty of Alonzo Bailey, a negro laborer. It involves the constitutionality of said Section 4730 as finally amended.

This court has always carefully scrutinized cases where the Constitution is involved. It has held that in doubtful cases it would not declare an act of a State Legislature contrary to the Constitution, yet it has never hesitated to do so when the statute deprived one of his liberty without "due process of law," or "equal protection of the laws" or enforced involuntary servitude except in punishment of crime.

The purpose and effect of the first section of the Fourteenth Amendment to the Constitution of the United States, as stated in United States vs. Harris, 106 U. S. 629, was clearly defined by Mr. Justice Bradley in the case of United States vs. Cruikshank, 1 Wood 316, as follows:

> "It is a guaranty of protection against the acts of the State Government itself. *It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of a state.*" It furnishes an "additional guaranty against any encroachment by the State

upon the fundamental rights which belong to every citizen as a member of society."

United States vs. Cruikshank, 92 U. S. 542.
United States vs. Lee, 106 U. S. 196.

"DUE PROCESS OF LAW."

The amended act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall make or enforce any law which shall deprive any person of life, liberty or property without "due process of law."

On account of a rule of evidence in Alabama which prevents a person from testifying as to his uncommunicated motives, purpose or intent, plaintiff in error was unable to show by his own testimony that he entered into the contract in good faith and that he rescinded the contract for reasons other than those constituting a crime.

In McCormick vs. Joseph, 77 Ala. 236-240 it is said:

> "It is well settled in this State, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief or intention, when secret or uncommunicated; such mental status when relevant, being a matter of inference to be determined from the circumstances of the case by the jury."

Holmes vs. State, 136 Ala. 80-84.
Johnson vs. State, 102 Ala. 1-16.
Brown vs. State, 79 Ala. 51-54.
Harrison vs. State, 78 Ala. 5-11.
Alexander vs. Alexander, 71 Ala. 295-8.
Burns vs. Campbell, 71 Ala. 271-291.

Burke vs. State, 71 Ala. 377-382.
Wheeless vs. Rhodes, 70 Ala. 419-421.

There was no witness to the execution of the contract by whom plaintiff in error could prove his good faith, nor was there any witness to the rescission of the said contract by whom he could prove that he terminated the contract for reasons other than those constituting a crime; the only witness being the General Manager of the Company, with whom the contract was made. From the very nature of things, no evidence could be adduced on the question of intent. Any declaration made by him as to his motives either in entering into the contract or in failing or refusing to perform said contract was inadmissible as evidence in his favor on the trial. It has been established in Alabama that a defendant cannot thus make evidence for himself.

Harkness vs. State, 129 Ala. 71.

In the case at bar, the proof of the execution of the contract and plaintiff's failure or refusal to perform the said contract operated by the terms of the statute to make the petitioner *prima facie* guilty of a crime. But in as much as the right of rebuttal is denied under the law, as above explained, the statute prescribes a rule of evidence that is in reality *conclusive*.

It is conceded by the weight of authority, that if the legislature prescribed what is conclusive evidence or *if it takes away from a defendant the fair opportunity to establish his case of defense, the act of the legislature is contrary to that part of the Fourteenth Amendment of the Constitution of the United States which insures "due process of law,"* and is therefore unconstitutional and void.

Harvey vs. Elliot, 167 U. S. 409.
Ex parte Well, 107 U. S. 289.

Gaplin vs. Page, 85 U. S. 350.
Darthmouth College vs. Woodward, 4 Wheaton 518.

The legislature cannot under the guise of enacting a *prima facie* rule of evidence, fix a *conclusive* one. It is unimportant that the legislature calls such a rule *prima facie*. If it operates as a *conclusive* rule it is as baneful in its effect as if it was so called. In either event, it is contrary to the constitutional guaranty of "due process of law." That the statute in question is offensive to this provision of the Constittuion cannot be doubted.

In the case of Dartmouth College vs. Woodward, 4 Wheaton U. S. 518-581, which has been relied upon, probably more than any other authority, to throw light upon and to explain the rights, protection and franchises deprived from the grant of the Government, Mr. Daniel Webster, in his argument, quoted from Lord Cope's Explanation of the 29th Chap. of *Magna Charta*:

> "'No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), *by the due course and process of law*'".

He then said:

> "By the law of the land is most clearly intended the general law; *a law which hears before it condemns;* which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. *Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land*". * * *

"Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

In Wright vs. Cradlebaugh, 3 L. Ed. 341, it was held that "due process of law" requires that a party shall be properly brought into court, and when there, shall have a right to set up any lawful defense.

In Hubey vs. Reily, 53 Pa. (3 P. F. Smith) 112, it was held that "due process of law" includes an opportunity to answer.

Clerk vs. Mitchell, 64 Mo. 564, said "due process of law" means a law which hears before it condemns.

Both as a matter of law and of fact, every person is presumed to be innocent until his guilt is proved beyond a reasonable doubt and it is the high and solemn duty of the court to see that all of the elements of the crime are proved or that testimony is adduced which justifies the jury in finding these elements.

Clyatt vs. United States, 197 U. S. 207-222.

The legislature further denied "due process of law" when it amended said statute so as to authorize the court to convict of fraud on no other evidence than that, of the execution of a contract, the failure to return the consideration therefor, in case of its breach or the failure to perform the services provided for in the said con-

tract. The refusal or failure of plaintiff in error to perform such service or to return such consideration gave rise only to a civil action. He was denied "due process of law" by being burdened with *prima facie* evidence of an intent to injure or defraud his employer since the above facts have no relation to nor any tendency to prove a crime.

State vs. Beach, 147 Ind. 74.
Meadowcraft vs. People, 163 Ill. 56.
People vs. Cannon, 139 N. Y. 431.
Commissioners vs. Merchants, 103 N. Y. 148.
Wigmore on Evidence, Note 6, Sec. 1364.

The said amended statute further denies "due process of law", in that, there is an attempted substitution of the judicial department of the State government for the legislative.

To raise a *prima facie* case (which almost invariably establishes the guilt and without which the plaintiff in error could not have been held) it must be shown that the defendant refused or failed to perform the contract "without just cause". What constitutes "just cause"? The legislature, contrary to its duty, has not defined it. No attorney can advise what constitutes it. No man can tell whether or not he is within the limits of the law, as different juries might reach different conclusions under the same state of facts. Whether or not one should be burdened with a *prima facie* case depends upon the view reached by the jury, which depends upon elements which no man, with certainty, can foresee. There is no criterion laid down by the statute by which one can regulate his actions so as to know that he is abiding by the law.

In United States v. Reese, 92 U. S. 214, cited with approval by Mr. Justice Brewer in James v. Bowman, 190 U. S. 127-140, the Court said:

"A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; * * * *Every person should be able to know with certainty when he is committing a crime.* * * *

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who could be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government."

In James v. Bowman, 190 U. S. 127-142, the court said:

"A criminal statute should define clearly the offense which it purports to punish."

In Chicago & N. W. Ry. Co. v. Dey, 35 Fed. Rep. 866-876, it was contended that a statute was unconstitutional which was to punish criminally where an "unreasonable" charge was made. The court said:

"If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In Tozer v. United States, 52 Fed. Rep. 917-919, the Court said:

> "in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. *The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable.*"

In L. & N. R. R. Co. v. Commonwealth, 35 S. W. Rep. 129, the Court, in construing a statute punishing criminally "for charging more than a just and reasonable rate." The Court said:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate or toll or compensation' cannot be denied; and that different juries might reach different conclusions, on the same testimony, * * * must also be conceded. The criminality * * * depends on the jury's view of the reasonableness of the rate charged. * * * There is no standard whatever fixed * * * by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime. * * * 'One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent.'"

the State, which provides: 'That no person shall be imprisoned for debt'. It is to be observed in the outset that this provision of the organic law is essentially different from the provisions on this subject in many other state constitutions, *in that it contains no exception of 'Cases of Fraud'*". * * * *the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, whether they involved fraud or not.* * * * *This one* (the act) *cannot be read without conviction that its purpose is to impose imprisonment for debt and to coerce the payment of a debt by the duress it authorizes.* Its requirement that the fine shall be paid only in money, that it shall be *double the amount deposited, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit*, tends, at least, to show that coercion of payment of the debt which the depository owned by the depositor * * * to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of the enactment of the statute."

The Statute purges the offense if the money is repaid and creates a *prima facie* presumption of fraud only when there is a breach of the contract to the injury of the employer or landlord.

The act was adopted solely for the benefit of the employer and landlord. The employee and tenant are singled out and imposed with burdens, imposed upon no other class or individuals within the State. The employee or renter cannot go into court with equal rights and equal protections. Even peonage with all of its harshness did not go so far as to subject only the peon

with the burden of the contract. The master was also subject to its burdens.

While this act in appearance is general in effect it applies only to that form of service which is rendered by the commonest laborer or the poorest tenant of farmlands. The act contemplates those contracts where the amount involved is $150.00 or less. It contemplates an advancement of money or other personal property to laborers or poor tenants. It is a matter of common knowledge, that, in Alabama, such laborers and such tenants, as a class, are negroes. The administration of responsibilities under the said amended statute is purely political and deprives the employee and tenant of the fundamental rights of liberty, the pursuits of happiness and the blessings of civilization, which are guaranteed under the reign of just and equal laws, by our Federal Constitution.

Judge Thos. G. Jones, in Peonage Cases, 123 Fed. 671, held the act of the Legislature of Alabama of Mar. 1, 1901, General Acts, 1900-1901, page 125, unconstitutionel, which made it a penal offense, where any one who has contracted in writing to labor or serve another, or who has leased or rented lands for any specified time, should without the consent of the other party and without sufficient excuse, to be adjudged by the court, fail to carry out such contract, and take employment of a similar nature without giving notice of the prior contract. And on page 688, said:

> *"It is a vicious species of class legislation. Its criminal penalties are grafted only upon contracts between laborers and renters on farm lands, and their hirers or landlords. It is designed solely in the interest of the employer or landlord. The latter may discharge the laborer or renter, or fail to come*

up to promise to him, without sufficient excuse; yet this legislation gives the renter or laborers no unusual recourse against him employer or landlord, while, in effect, though not in name, it pronounces practical outlawry, in favor of the landlord, against laborers or renters, regarding their right to labor and persue their accustomed vocations, by attaching special and extraordinary penalties to their breaches of contract with landlords and employers".

* * *

'It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our institutions and laws, that one citizen shall enjoy privileges and advantages which are denied to all others under like circumstances; or that one shall be subject to losses, damages, suits or actions from which others under like circumstances are exempted.' Holden vs. James, 11 Mass. 396, 6 Am. Dec. 174."

In Ex parte Brayton, et al., 153 Fed. 986, the Court in construing a North Carolina statute very much in the nature of the Alabama statute construed in 123 Fed. 671, took the same view as was taken in the Peonage Cases.

In William Adair vs. United States, 208 U. S. 161, a statute forbidding the discharge of an employe because of membership in a labor organization, was held unconstitutional. Mr. Justice Harlan, who delivered the opinion, said:

"The general right to make a contract in relation to his business is part of the liberty of the individual, protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer vs. Louisiana, 165

U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427. * * * *"In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."*

In Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, cited with approval in Collins vs. Godard, 183 U. S. 79, and in Connoly vs. Union Sewer Pipe Co., 184 U. S. 540-560, by Mr. Justice Harlan, and in Magoun vs. Illinois Trust Company, 170 U. S. 283-294, by Mr. Justice McKenna, Mr. Justice Brewer in delivering an opinion in reference to "equal protection of the laws" and against the constitutionality of the Texas statute imposing an attorney's fee upon a railroad corporation, in addition to costs, which omitted to pay certain claims within a specified time, on page 153, said:

"The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equal with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. *They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the*

suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection."

Then further, on page 159, said:

"No language is more worthy of frequent and thoughtful consideration than those words of Mr. Justice Mathews, speaking for this court, in Vick Wo vs. Hopkins, 118 U. S. 356:369 (30; 220; 226): 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' * * * *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."*

On page 153, Mr. Justice Brewer also said that even "slight approaches or slight deviations from legal modes of procedure" should be checked. "This can only be obviated by adhering to the rule that constitutional provisions for the security of personal property should be liberally construed."

See, also:

Chair Co. vs. Runnels, 77 Mich. 105;
Wilson vs. Railroad Co., 70 Mich. 384.

Ex parte Hollman, 60 S. E. (S. C.) Report, 20, is a case in which the constitutionality of a South Carolina statute was questioned. The said act provided that any

laborer working for a consideration, and who received advances and thereafter willfully and without just cause, failed to perform the services, should be liable to prosecution for a misdemeanor, provided that the contract was witnessed by at least two credidible witnesses. The court held the act to be unconstitutional. The court, in its opinion, said:

> "The farmer makes large expenditures * * * on the faith of the labor contract; and if those whom he engaged act in bad faith, in leading him to depend upon their labor, and make advances to them, with no intention of rendering the service expected, much loss is incurred. So, also, if the dishonest landlord secures the labor of those he employs, with a fraudulent intent not to pay for their work. * * * Hence it seems not unreasonable for the General Assembly to guard against fraud and enforce honesty in such contracts by special sanction. But *even if this statute provides punishment only for fraud in such cases, it violates the Fourteenth Amendment of the Constitution of the United States* and * * * of South Carolina, *in that it does not bear equally on the landlord and laborer.* The parties to a contract are entitled to equal sanction of the law for the protection and enforcement of their rights under it. * * * Equal protection embraces the right of equal exemptions."

The Court, on this point, cited:

U. S. in Connoly vs. Pike Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679;

Barbier vs. Connolly, 113 U. S. 27, 5 Sup. 357, 28 L. Ed. 923;

Peonage Cases, 123 Federal, 686.

It is, of course, proper that Bailey should have performed his part of the contract, or should have placed the other party in status quo. But it is more improper and unjust to have him burdened as the said amended act provides.

Cotting vs. Godard, 183 U. S. 79;
Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150-159;
Jim Leeper vs. State of Texas, 139 U. S. 462;
Bell's Gap R. Co. vs. Penn., 134 U. S. 232-237;
Vick Wo. vs. Hopkins, 118 U. S. 356-369;
Barbier vs. Connoly, 113 U .S. 27-31.

ERROR OF THE SUPREME COURT OF ALABAMA.

It is insisted that the learned Court erred in distinguishing and sustaining the statute upon the theory that the "intent to injure or defraud" lends it a virtue which admittedly it could not otherwise possess. (Record, p. 8).

The Court adopted the premise that "a mere breach of the contract cannot be made the foundation for a criminal offense and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet when the individual enters into such contract with the intention to perpetrate a fraud * * * it is within the legislative competency to enact a law penalizing the entering into a contract." The Court further said: "on its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional."

The plaintiff in error is more concerned with the effect which the Alabama Courts give to the statute than with what appears from its face. The learned

Court seems to overlook the important point, that the employee or tenant who contracts with the most innocent intention may, by his breach, be immediately burdened with a presumption of fraud from its execution, under a statute which the Court only justifies on constitutional grounds by assuming it to be directed solely against cases where fraud existed ab initio. When it is seen that the statute holds up to those making contracts, however lawful their intent, the threat that upon breach or failure to perform they will be subjected to a criminal prosecution, disadvantaged in advance by the *prima facie* presumption of fraud, it is difficult indeed to conceive how the learned Court avoided the conclusion that the statute placed "undue restriction" on the right to contract.

In Henderson vs. Mayor of New York, 92 U. S. 259, the Court said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Fong vs. United States, 149 U. S. 729, cited in Thomas vs. State, 144 Ala. 77, did not authorize the creation of a *prima facie* rule of evidence therein. The Court said:

> "The reason for requiring Chinese aliens claiming the privilege of remaining in the United States to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness'" was on account of the "suspicious nature in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notion entertained by the witnesses of the obligation of an oath".

INVOLUNTARY SERVITUDE.

It is further submitted to the Court that the identical result is obtained under the said amended statute which was obtained under the "System of Peonage."

In New Mexico, at the time of the passage of the Peonage Statute (Section 1990 and 5526 Revised Statutes) there existed a system of labor inherited from Spain which was commonly known as "Peonage". The system, however, was not known as Peonage by the laws of New Mexico but as a relation of master and servant. Peonage was not slavery as formerly existed in this Country. The peon was a free man possessing both civil and political rights. The essentials of the Peonage contract were consent of parties, the thing or service contracted for, the duration of the contract and the consideration therefor. After entering into the contract, the peon became bound to the master "for an indebtedness founded upon an advancement in consideration of service." The Peonage Contract could be rescinded only by mutual consent, by payment of the indebtedness or on account of some grave injustice. If the peon refused to fulfill his part of the contract "the court would compel him to pay the principal and interest to the other party, and might order the sheriff to contract the services of the peon to the highest bidder. The same proceeding could be had against the master if he failed to pay what he was ordered."

Peonage sanctioned involuntary servitude as an obligation growing out of a contract; it sanctioned the exercise of a dominion over the person and liberty of the peon by the master to coerce a liquidation of the obligation under the contract. Even if the entering into the peonage system was voluntary, it becomes involuntary

the moment the peon desired to withdraw and was was coerced to perform the services against his will.

Peonage Cases, 23 Fed. 673;
Jaremillo vs. Romeo, 1 N. M. 190.

The essentials of the Labor Contract under the Alabama Statute are, mutual consent of parties, the services contracted for or the land rented, the duration of the contract and the consideration therefor. After entering into the contract, the employee becomes bound to the employer "for an indebtedness founded upon an advancement in consideration of service". The contract can be rescinded only by mutual consent, by payment of the indebtedness or on account of some injustice on the part of the employer or on account of inability to perform. If the employee fails or refuses to fulfill his part of the contract he is taxed with and forced to overcome a presumption of fraud and in case of his conviction, which invariably happens, the sheriff collects for the employer, from the fine of the employee, the principal and interest due under the contract. The same proceedings cannot be had against the employer if he fails to comply with the terms of his contract.

The Labor Contract sanctions a presumption of intent to defraud as an obligation growing out of the contract and enforces involuntary servitude by virtue of the presumption. The provisions of the amended statute constitutes a coercive weapon which enables the employer or landlord to send to hard labor or jail the employee or tenant who refuses or fails to discha the obligations under the contract. Legally whatever may be the status, otherwise, the entering into the contract is involuntary since the Peonage statute forbids consent.

Such petty differences should not be tolerated. The statute should be read so as to reach its general and ordinary effect.

On page 674 of the Peonage Cases, 123 Federal, the Court said:

> "The evils of the system not only degraded those who were subject to the system, but exercised a baleful influence upon all other classes which in innumerable ways fought against the industrial prosperity and moral advancement of the people among whom 'the system' was enforced."

The said amended statute, in violation of the Thirteenth Amendment, enforces involuntary servitude not in punishment of a crime, and is also repugnant to the Peonage Statutes in that said amended statute violates the Fourteenth Amendment and is, therefore, unconstitutional and void and in no manner authorizes the holding of the plaintiff in error.

Clyatt vs. U. S. 197, U. S. 207;
Ex parte Hollman, 60 S. E. (S. C.) 20;
Ex parte Brayton, et al., 153 Fed. 986;
In re Lewis, 114 Fed. 963.

CONCLUSION.

It is respectfully urged that this Court cannot escape the conclusion that the said amended statute is repugnant to so much of the Fourteenth Amendment of the Constitution of the United States which guarantees "Due process of law" and "Equal protection of the laws" and that the said statute is equally repugnant to the Thirteenth Amendment of the Constitution, and

that plaintiff in error should, therefore, have been discharged.

Respectfully submitted,

Attorney for Plaintiff in Error.

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Montgomery, Ala.
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

ALONZO BAILEY, PLAINTIFF IN ERROR,
v.
THE STATE OF ALABAMA.
No. 538.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

I.

THIS STATUTE IS UNCONSTITUTIONAL AND VOID BECAUSE IT VIOLATES THE THIRTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

To enforce the thirteenth amendment, Congress passed the act carried into Revised Statutes, section 1990:

> * * * all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico or any other Territory or State, * * * by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, are declared null and void.

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In *Clyatt* v. *United States* (197 U. S., 207) this court tersely said:

> That which is contemplated by the statute is compulsory service to secure the payment of a debt.

The thirteenth amendment operated upon the individual and determined that involuntary servitude, by whatever name it might be known or whatever form it could assume, should not exist anywhere in the Republic. And the statute, in the most comprehensive terms, declares absolutely void any attempt, in any manner, by legislation or in any other way, directly or indirectly, to bring into being, in any degree, a condition of involuntary servitude. If the effect of any law, State or Federal, is to produce this result, such law is a violation of the great declaration of personal liberty embodied in the thirteenth amendment.

The statute of Alabama, under which the plaintiff in error is held, is one of a series of acts, the evident purpose of which is to secure compulsory service in payment of a debt. By an act, approved March 1, 1901, it was made a misdemeanor for any person who has contracted in writing to labor for or serve another for any given time, to leave the service of said person before the expiration of such contract and without the consent of said employer, and to make a second contract of similar nature or character with another person, without giving such second employer notice

of the first contract. This act was declared by the State Supreme Court unconstitutional, "because of the restrictions it purports to place on the right to make contracts for employment and concerning the use and cultivation of land." (*Toney* v. *State*, 141 Ala., 120, 125.)

United States District Judge Jones, in an opinion (*Peonage cases*, 123 Fed. Rep., 671, 691) also declared this law unconstitutional upon the further ground that it denied to laborers the equal protection of the law guaranteed by the fourteenth amendment.

Subsequently a statute was passed which became a part of the Alabama Code, section 4730. This statute originally was included in the law providing punishment for obtaining money, etc., by false pretenses.

At following sessions of the legislature this act was amended by certain additions. It is to be observed that these amendments served to render more specific the application of the law to a certain class of tenants of land and laborers and to accentuate the character of the legislation as defining a criminal offense and providing the punishment for its commission.

The present amended act is as follows:

> 6845. *Contract for performance of act or service.* Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer,

and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county, and one-half to the party injured. And the refusal of any person who enters into such contract to perform such act or service or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be *prima facie* evidence of the intent to injure his employer or landlord or to defraud him.

The constitutionality of section 4730 has been attacked in the courts of the State in several cases, but the statute has been there upheld. In *Vann's case* (43 Southern Rep., 357) it was insisted that the

act was repugnant to the section of the Bill of Rights of Alabama, "that no person shall be imprisoned for debt." Adopting the language in another case, the court said:

> The ingredients of the offense are: (1) A contract in writing by the accused for the performance of any act or service; (2) an intent on the part of the accused, when he entered into the contract, to injure or defraud his employer; (3) the obtaining by the accused of money or other personal property from such employer by means of such contract entered into with such intent; and (4) the refusal by the accused, with like intent, and without just cause, and without refunding such money, or paying for such property, to perform such act or service. * * * A mere breach of the contract is not made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause.

And the court added:

> While the statute purges the offense if the money is repaid, it does not convert the intent on the part of the legislature into seeking imprisonment for debt, rather than preventing and punishing fraud. The statute could be a valid one for punishment of fraud with this requirement or proviso omitted.

In a case, *Banks* v. *The State* (124 Ga., 15), the court had said of a similar provision:

> On the face of it the purpose of the act is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional; otherwise it would not be so.

In *McIntosh* v. *The State* (117 Ala., 128, 130), the court said:

> Refunding the money, or restoring other property, with which the employer, by reason of the contract, was induced to part, is a principal purpose the statute is intended to enforce. When the money is refunded, or the property restored, the employer is saved from injury or loss, and subsequent breaches of the contract must be redressed by the pursuit of civil remedies. The rendition of service by the defendant for a period more than sufficient to have repaid the money advanced to him takes away an essential ingredient of the offense.

These cases show the relation of this statute to the state constitution. In none of them was the question of repugnancy to the United States Constitution urged. In the case at bar, however, the statute was attacked upon the ground that it violated the thirteenth amendment in that its effect is to subject the defendant to involuntary servitude not as a punishment for crime.

The Alabama Supreme Court determined that the act was not subject to this objection. It places its

judgment upon the same reasoning relied upon in the previous cases.

> While it is clear that a mere breach of contract can not be made the foundation for a criminal offense and that undue restrictions can not be placed on the right of an individual to enter into contracts, yet when the individual enters into a contract with the intention to perpetrate a fraud it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract with such intent and obtaining money or other personal property through such agency.
>
> This is all that is effectuated by the legislation in question. On its face, the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional. (Rec., p. 8.)

It is to be regretted the court did not go into "further extension of this argument" in its relation to the thirteenth amendment and the statute to enforce it. Instead, the decision is put mainly upon the former decisions which denied the repugnancy of the act to the state constitutional inhibition of imprisonment for debt.

The previous decisions were based upon the general principle that the legislative power could make that criminal which before was innocent. And, in this case, the doctrine of *stare decisis* was applied to its

extreme limit. If the statute is not liable to the objection that it prescribes imprisonment for debt, it does not follow that it may not permit an attempt to compel involuntary service or labor on the part of a debtor in liquidation of a debt or obligation. Indeed, a statute which did provide imprisonment for debt, if such imprisonment were not prohibited by the state constitution, might yet also involve this forbidden attempt.

While it might be admitted that it is within the competency of the legislative body to make the fraudulent contracting of a debt or the fraudulent avoidance of its discharge criminal, that does not preclude an examination of a statute, passed apparently to those ends, to discover what is its real purpose. Whatever its language, its intent must be determined by its natural and reasonable effect. (*Henderson* v. *The Mayor, &c.*, 92 U. S., 250.)

> In all cases of this kind (exercise of police power) it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose. (*Morgan's Railroad* v. *Louisiana*, 118 U. S., 455.)

What is the purpose of this act as shown by the history of the legislation, by the text, and by the construction placed upon it by the Supreme Court of the State?

The later enactments do not alter the purpose of the original act. That purpose, undeniably, was to secure the performance of personal service by a laborer or tenant of lands, by inflicting punishment or imprisonment if he violated his contract of service. That the amendments still have in view this object is plainly shown from the text.

It was necessary to relieve the statute in appearance from repugnancy to constitutional guarantees. Therefore the intent to defraud in the initiation of the contract was provided. This intent to defraud "marks the line of cleavage" from the former act. The connection of ultimate purpose is not severed. Nominally this intent to defraud must be present both in obtaining money or other personal property from the employer and in refusing to perform the service without refunding the money or paying for the property.

In construing the statute the Alabama court has said: "Refunding the money, or restoring other property, is a principal purpose the statute is intended to enforce." The money advanced or the value of the property obtained became a debt. If it be not paid and the laborer quits the service, he may be tried, and, if convicted, imprisoned. He can relieve himself of the debt and the liability to imprisonment by continuing the service. The purpose of the statute is to compel the service by the threat of imprisonment.

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It is no answer to say, "the statute merely condones the offense by permitting the defendant to repay or refund." If this statute is good as creating the criminal offense, there can be no condonation by an act of the accused. The idea of such condonation negatives the distinctive character of the criminal statute. That is to say, if the state law were sincerely intended only to punish fraudulent practices and to make the breach of contract criminal as a form of obtaining money under false pretenses, it would be wholly inconsistent with that intention to allow the offense to be purged by repayment of the money advanced.

Our inquiry is as to the purpose of the act. If that be to obtain the return of money or property advanced, and failing such return to secure service, it is, in its effect, an attempt to obtain the service of a peon in liquidation of a debt or obligation, and is void.

The amendment particularizes a class by applying its provisions to tenants of land. It is against this body of agricultural laborers, the largest class of laborers in the state, the statute is thus principally directed. They are the persons who do not and can not own the lands and are dependent upon the owner for subsistence while raising the crops. They would probably, be included in those mentioned in the first clause, but to reach them beyond doubt they were specifically designated. That they are these dependents is obvious from the limit placed upon their

indebtedness. The "damage," which can only be by fair construction the amount of money or property advanced for maintenance and for what is supplied necessary to cultivate the land, is restricted to one-half of the maximum fine of three hundred dollars, half of which goes to the employer or landlord. If the laborer quits the service, and is convicted of the offense and pays the fine, the employer is repaid. But ordinarily the laborer can not pay the fine; if he could, he would have refunded the amount due before trial. Consequently he is almost always imprisoned. This virtual certainty of imprisonment is ever present with the laborer, driving him to the field and the labor with a compulsion stronger than the guard and the lash to the Mexican peon. What is this but "compulsory service to secure the payment of a debt?"

The reasonable operation and effect of the statute as an attempt to establish, maintain, and enforce involuntary service or labor is further exhibited in the provision:

> The refusal of any person who enters into such contract to perform such act or service, or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be *prima facie* evidence of the intent to injure his employer or landlord or to defraud him.

We have seen the several amendments to the original act were enacted at different times to strengthen the hold the employer has upon the service of the

> and there is no crime if the advances are repaid, a grave question arises whether these sections are not in violation of the provisions in the state constitution (art. 1) forbidding "imprisonment for debt, except in cases of fraud," and also whether they do not conflict with the thirteenth amendment to the Constitution of the United States against "involuntary servitude, except as punishment for crime whereof the party shall have been (i. e., previously) duly convicted." If the service is enforced, unless the debt is paid, is it not "involuntary servitude?"

In South Carolina a statute, providing "that any laborer working on shares of crop or for wages in money or other valuable consideration, under a verbal or written contract to labor on farm land, who shall receive advances either in money or supplies and thereafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall be liable to prosecution for a misdemeanor," and on conviction may be punished by imprisonment or fine, was before the United States District Court (Ex parte Drayton, 153 F. R.), and the State Supreme Court (Ex parte Hollman, 60 S. E. Rep., 19). In both courts the statute was declared unconstitutional, among other reasons as violating the thirteenth amendment. In the case in the United States District Court the Alabama satute was distinguished from the South Carolina statute, although, it not being in issue, no opinion was proffered as to its constitutionality.

THE STATUTE IS UNCONSTITUTIONAL AND VOID BECAUSE IT VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION, IN THAT IT DEPRIVES A PERSON OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

It is submitted that the clause of the statute above cited, providing that certain acts shall be *prima facie* evidence of the intent to injure or defraud, is a violation of the fourteenth amendment.

In a recent case, decided at this term of the court, *Twining* v. *State of New Jersey*, Mr. Justice Moody, delivering the opinion of the court, said:

> * * * consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

He then proceeds to cite some expressions of this court supporting that idea: *Bank* v. *Okely*, 4 Wheat., 235, 244 (approved in *Hurtado* v. *California*, 110 U. S., 516, 527; *Leeper* v. *Texas*, 139 U. S., 462, 468; *Scott* v. *McNeal*, 154 U. S., 34, 45); *Holden* v. *Hardy*, 169 U. S., 366, 389; *In re Kemmler*, 136 U. S., 436, 448; *West* v. *Louisiana*, 194 U. S., 258, 263.

In making the application to this case we are to inquire what fundamental principles which protect the citizen in his private rights have been disregarded in the statute under consideration.

The general rule that it is within the acknowledged power of the legislature to prescribe rules of evidence in civil and criminal cases may be admitted. But the rule is subject to qualifications, especially in criminal proceedings. Although it has been said, "this power has been often exercised by the legislature, with the sanction of the courts, so as to change the burden of proof or to affect the question what shall be deemed *prima facie* evidence at the trial before the jury" (*Holmes* v. *Hunt*, 122 Mass., 505–517), it must always be understood that the power is to be exercised with recognition of the fundamental principles inhering in the law.

In an elaborate opinion in *People* v. *Cannon*, 139 N. Y., 32, where the authorities were collated and examined, Peckham, J. (p. 43), said:

> It can not be disputed that the courts of this and other States are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y., 143, *supra*.) The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary, and the accused must have in each case a fair opportunity to make his defense

> and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof.

The Rhode Island cases, referred to below, were cited by Judge Peckham and distinguished from the statute he was reviewing.

In *State* v. *Beswick* (13 R. I., 211) the clause in a statute providing that—

> * * * the notorious character of any such premises, or the notoriously bad and intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog shops, tippling shops, or places where such liquors are sold, shall be *prima facie* evidence that such liquors are kept on such premises, for the purposes of sale within the State,

was held unconstitutional. Durfee, C. J., said (p. 217):

> * * * It virtually strips the accused of the protection of the common-law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land."

Again, p. 218:

> * * * Among these rules there is none which is more fundamental than that every person shall be presumed innocent until he is proved guilty. "This rule," said Judge Selden, in *The People* v. *Toynbee* (2 Park Cr., 490, 526), "will be found specifically incorporated into many of our state constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.'" Indeed, to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. (See also *State* v. *Kartz*, ib.)

In *Board of Commissioners* v. *Merchant* (*supra*) (p. 148), Judge Earl said:

> A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law * * * which made that *prima facie* evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act.

Numerous cases have been and may be cited here cases which made acts *prima facie* evidences crime have been sustained; but always these distinctions have been kept in mind. They are examined in the cases above noted, and it is unnecesry to further refer to them. In all of them will e found a distinction between a law that would ake evidence conclusive which was not necessarily in and of itself, thus precluding a defendant from owing the truth, and a law making particular cts *prima facie* evidence of the fact to be estabshed, leaving the defendant at liberty to rebut and vercome them by contradictory and better evience.

It is contended that the intent to defraud is the iminal act in this statute. None of the acts which re mentioned in the statute, the making of the conact, the obtaining of the money or property, the ilure to refund or pay, the failure to perform the rvice, is of itself criminal. But the statute makes ese innocent acts *prima facie* evidence of guilt. his creates a presumption of law as well of fact. his presumption is entirely different from the preumption arising from proving the commission of an t otherwise criminal which operates to relieve the rosecution of the necessity resting on it in the first stance to adduce evidence of an actual criminal tent on the part of the accused. Thus, an intent murder is presumed from the deliberate use of a adly weapon. (Hammon, Evidence, 198.) Here e acts have no relation whatever to a criminal act

and no tendency whatever, by themselves, to prove a criminal act.

"Where an act, in itself indifferent," said Lord Mansfield, in *Rex* v. *Woodfall* (5 Bur., 2667), "if done with a particular intent become criminal, the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies in the defendant, and in failure thereof the law implies a criminal intent."

This statute makes these acts, in themselves as consistent with innocence as with guilt, sufficient evidence of guilt. It presumes guilt as matter of law. And in its practical operation it makes this a conclusive presumption.

By the law of Alabama a person on trial for a criminal offense can testify for himself; but it has been decided that he can not testify as to his uncommunicated purpose or intent, "such mental status, when relevant, being a matter of inference to be determined from the circumstances of the case by the jury." (*McCormick* v. *Joseph*, 77 Ala., 236–240.)

How is the presumption of guilt which this statute impresses upon the accused to be rebutted? It is said in this very case that Bailey, the accused, was not even called as a witness. Why call him? What could he testify to? He would have to admit signing the contract, receiving the advance, working for a time, failure to refund or pay for supplies, and quitting the service. As to anything further, his mouth was closed. The "inferences from the circumstances of the case" as to his intent are determined by the pre-

sumption of law created by this statute. He is deprived of his right to submit to the jury the thing to be proved—fraudulent intent. He is denied trial by jury, which is guaranteed to him by the constitution of Alabama. This right, to its fullest extent, thus acknowledged, is protected as "due process of law" by the fourteenth amendment.

This clause takes away from the accused the presumption of innocence. The controlling presumption of guilt raised by it is wholly irreconcilable with the presumption of innocence. These can not exist together without unreasonable confusion. In *Coffin* v. *United States* (156 U. S., 432, 453) Justice White, speaking for this court, said:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal laws.

This axiomatic principle is substantially destroyed by the creation of the artificial presumption of guilt; a presumption "unreasonable and unnatural." The "rule of evidence" attempted to be established receives no assistance from the words "without just cause." The uncertainty of this phrase, and its absolute want of application to the meaning and purpose of the acts made evidence of the intent, render it meaningless. If they have, or were intended to have, any force, it would be necessary for the prosecution to prove that the acts were "without just cause." It is perfectly clear, without argu-

ment, that the effectiveness of the *prima facie* clause would be nullified if it became necessary to prove this negative. The Alabama court has so considered it. In *State* v. *Jim Thomas* (2 L. R. A., 1010, 1012), relied upon and approved in this case, the court said:

> * * * The solicitor, to raise the same question in a different form, requested a charge, "that the refusal or failure of defendant to perform the services alleged in the indictment, or to refund the money obtained from the employer under the contract, between him and defendant, and the failure or refusal of the defendant to pay for the property obtained under said contract, makes out a *prima facie* case of defendant's intent to injure or defraud said McCullough," which charge the court refused.
>
> * * * * * * * * * the court below erred in holding said amendatory act to be unconstitutional, and in not giving the charge requested by the State.

The phrase "Without just cause" was wholly ignored in this request.

For the above reasons it is respectfully submitted that the judgment of the Supreme Court of Alabama should be reversed and the prisoner ordered to be discharged.

CHARLES J. BONAPARTE,
Attorney-General.

ROBERT A. HOWARD,
Attorney.

O

mine this case. In the main brief for the defendant in error we did not consider these questions but presented the case on the merits. A careful investigation of the decisions of this Court now convinces us that in this proceeding the merits of the case cannot be determined.

Section 709 of the Revised Statutes provides that "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, * * * any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised, under United States and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Bearing in mind that the plaintiff in error was arrested on an affidavit charging him with violation of a state law, that he applied for his discharge on *habeas corpus*, that his petition was denied below and again on appeal to the State Supreme Court, we come to the question of whether the action of the Supreme Court is a final judgment or decree is a suit within the meaning of Section 709 of the Revised Statutes. This immediate question was first considered by this Court in the case of Holmes vs. Jennison, 14 Peters 540. In this case Holmes presented a petition to the Supreme Court of Vermont setting forth that he was unlawfully imprisoned and praying for a writ of habeas corpus. The

writ was issued and on the return to the writ the court declined to grant the petition. Holmes then sued out a writ of error from this court to the Supreme Court of the State of Vermont. The writ of error was dismissed, the court being equally divided, as to whether there was drawn in question the validity of a treaty or a statute or an authority exercised under the United States. The question of whether this court had jurisdiction of the proceeding under the 25th section of the Judicial Act of 1789, now section 709 of the Revised Statutes, was discussed at length. The opinion of Chief Justice Taney, that such jurisdiction existed, was concurred in by Justices Storey, M'Lean and Wayne. Justice Catron in a separate opinion concurred in this holding. Justices Thompson and Baldwin held that the jurisdiction did not exist and Justice Barbour did not consider this point. Thus it will be observed that five members of the court held that the jurisdiction existed. We desire to call attention particularly to the opinion of Justice Baldwin, which contains the most elaborate discussion of the question that can be found. The following excerpts are taken from his opinion:

> "It has been demonstrated at the bar that the question brought forward on a habeas corpus is always distinct from that which is involved in the cause itself."
>
> "This being a mere inquiry, which, without deciding upon the guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail."

"It is an exercise of appellate jurisdiction and we are but revising the effect of their (the lower court's) process, under which the prisoner is detained."

"It lies only from a final judgment, in a civil action, etc., brought in a Circuit Court (of the United States) by original process, or removed there from a State or District Court; consequently, it lies not upon a proceeding upon a habeas corpus, which is the exercise of appellate power commencing on petition, affidavit and motion for the writ, and terminating by an order which the court makes according to its discretion. This order, from its nature and effect, is not and cannot be final; for it only discharges the party from any further confinement, under the process under which he was arrested, but not from any other process which may be issued against him under the same indictment."

"In following to its consequences, the settled principles of this court, that in issuing and acting upon a writ of habeas corpus under the 14th section it is by appellate power, it will appear that the reasons for so considering this power are most conclusive against the exercise of their appellate jurisdiction over writs of error to the proceedings of a State or Circuit Court, on such a writ issued by either."

"Let, then, whatever term, action, case, cause, suit, be given to a writ of habeas corpus and the proceedings upon it; let the final action of the court upon it be called a decision, an award, a judgment, or order, the character or nature of either, and the effect are the same; nothing is revised but the process of arrest, and the decision on which the process

issued, and the arrest is made; the inquiry is limited to the cause of commitment, and every question arising is always so distinct from the cause itself this this inquiry can be determined by one court and the cause by another."

"Any judgment rendered by the court affects only the process; nor can it be in any sense deemed a final judgment in a suit on the cause itself, or a final decision of the same so as to make it cognizable in this court by any appellate jurisdiction, on a writ of error to a circuit court, under the 22nd, or a State court under the 25th section of the Judiciary Act."

"To sustain a writ of error on a proceeding on a writ of habeas corpus under the Judiciary Act, a mere inquiry must be construed to mean a final judgment, a final decision; the cause of commitment becomes the cause of action, or prosecution, the suit, the original suit, the cause."

"It is not enough that the term 'any suit' may embrace a case of habeas corpus; it must be one which in all other respects admits of the action prescribed in the Judiciary Act, in all its provisions relative to the appellate jurisdiction of this court."

Holmes v. Jennison, 14 Pet. 620, et seq.

In Exparte Milligan, 4 Wall. 2, the majority of the Court held that the proceeding for the writ of habeas corpus was a cause within the meaning of the Fourteenth Section of the Judiciary Act which dealt with the question of certifying to the Supreme Court a division among the Circuit Judges. The several decisions of this Court in which the question was consid-

ered as to what constituted a suit, were reviewed, and the decision of the majority of the Court in Holmes vs. Jennison, followed. It should be noted, however, that in the Milligan case the proceeding did not reach this Court on a writ of error from a State Court but the same was originally instituted in the Federal Court and certified to the Supreme Court on a division of the Judges.

In the case of Yick Wo. vs. Hopkins, 118 U. S. 356, the plaintiff in error was found guilty of violating an ordinance of the Board of Supervisors of San Francisco City. He then petitioned the Supreme Court of California for his discharge on habeas corpus. That Court denied the writ and the petitioner prosecuted his writ of error to the Supreme Court of the United States, and the judgment of the lower Court was reversed and the case remanded with direction to discharge the petitioner. The question of practice and the jurisdiction of this Court to review habeas corpus on writ of error was not considered.

From this review of the decisions on this question it will be noted that the proposition has not been distinctly decided and is yet open for determination by this court. While it appears that the weight of authority may be in favor of the exercise of the jurisdiction, we submit that the better reasoning is opposed to the exercise by this court of such jurisdiction, in habeas corpus proceedings on writ of error.

But if Section 709 gives jurisdiction to review in this case, the question of whether such jurisdiction should be exercised, becomes a pertinent inquiry. In the case of Riggins vs. United States, 199 U. S. 546, Mr. Chief Justice Fuller, delivering the opinion of the Court, held that the sufficiency of an indictment, found in the Fed-

eral District Court and removed to a Circuit Court, could not, in the absence of exceptional circumstances, be tested by habeas corpus. "Ordinarily," said the Court, "the writ will not be granted when there is a remedy by writ of error or appeal, yet in *rare* and *exceptional* cases, it may be issued although such remedy exists." And further, "Defendant might have raised his objections to the indictment by motion to quash or otherwise. If the indictment were held good, as we are advised by the opinion of the Circuit Court, it would have been, defendant would have pleaded and gone to trial and might have been acquitted. If convicted, the remedy by writ of error was open to him.

> "'There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed and, if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obligated to decide questions *in advance of final adjudication*, contrary to the general rule and to many decisions we have heretofore announced upon the subject."

The same result was announced in the following cases:

> Re Lancaster, 137 U. S., 393;
> Re Chapman, 156 U. S. 211;
> Re Hunington, 137 U. S. 63;
> Ex parte Mirzan, 119 U. S., 584.

It should be borne in mind that each of the foregoing cases involved an indictment or process of a *Federal Court*, under which the petitioner was held.

In New York v. Eno, 155 U. S. 89, the appellee presented to the court below his petition for a writ of habeas corpus, alleging that he was restrained under State process. The lower court discharged the petitioner and on the appeal of the State of New York the judgment of the lower court was reversed and Mr. Justice Harlan, delivering the opinion of the court, held that a Circuit Court of the United States should not, *except in cases of urgency,* discharge upon habeas corpus, from custody under warrants issued by a State Court; and that the jurisdiction of the Supreme Court should be invoked by the defendant, on writ of error to the highest State court after final conviction, for his protection in respect of the Federal right asserted by him.

The leading case on this question is Ex parte Royall, 117 U. S. 241, in which Mr. Justice Harlan also delivered the opinion of the court and declined to discharge the petitioner who was detained upon State process. The jurisdiction of the Federal Courts to discharge on habeas corpus was admitted to exist, but such jurisdiction was then, and has in every subsequent case, been carefully confined by this court within the limits of the rule long since established, that such discharge will not be granted except in cases of *urgent necessity.* Indeed, but few cases can be found where this court has gone so far as to discharge a prisoner under State process. In almost every case which has arisen this court has declined the jurisdiction.

Turning to the record in the case at bar, there is not the slightest suggestion of an urgent condition which would authorize an interference by a lower Federal Court if the prisoner had presented his petition for discharge to that tribunal. The present case is solely an effort on the part of the prisoner and his diligent counsel

to test the validity of a State statute, and his rights are not shown or even suggested to be in jeopardy in the event this court fails to assume the jurisdiction now contended for. So clear is the record on this point that we are confident that it must be admitted by opposing counsel that the case falls within the general rule and not within the exception laid down in the Royal case.

This being true, we inquire whether there is any reason for not applying the same principle of law to the case which comes to this court by writ of error to the highest State court, rather than by appeal from a lower Federal Court. The only distinction is in the method in which the procedure reaches this court. If the lower Federal Court is confined within the limits of the rule of urgent necessity, there is the greater reason why this, the Supreme Court, should likewise be so confined.

This court does not sit to pass judgment upon moot cases, and cannot now be called upon by this defendant to pass upon the validity of the law, unless there is urgent necessity for doing so. If, therefore, he should be delayed in invoking his rights in the premises until after final trial, the probability that this case presents a moot question is apparent—for that he may be acquitted; or if not acquitted, the rule of evidenc may not be invoked against him; or if invoked, the trial court may declare such rule of evidence to be invalid.

DID THE SUPREME COURT OF ALABAMA DECIDE A FEDERAL QUESTION?

The opinion of Judge Denson in the case at bar (R. p. 9) concludes as follows: "We have discussed *all questions presented by the record*, and conclude that there is no error shown." The opinion makes no reference from the beginning to the end to a Federal ques-

tion. So that there is presented a case in which, while Federal questions were attempted to be raised in the court below, yet those questions were not considered or decided by the State Supreme Court. In this condition of the record it is submitted that the Federal questions cannot be reviewed.

Mills v. Brown, 16 Peters, 525;
Miss. etc. Co. v. Rock, 4 Wall. 177;
Mo. etc. Co. v. Fitzgerald, 160 U. S. 558.

And, therefore, this court should either dismiss the writ of error or affirm the judgment of the lower court.

Hale v. Akers, 132 U. S. 554.
Pefke v. Cronan, 155 U. S. 100.

VALIDITY OF STATUTE, TO WHAT EXTENT HERE INVOLVED:

If the court undertakes to pass upon the constitutional questions urged by counsel for plaintiff in error, it is our view that the court must first determine the validity vel non of the statute as it stood before the rule of evidence was added thereto by amendment. And if the validity of the original law is sustained the court cannot pass upon the validity of the subsequent legislation. It is the rule universally recognized that on habeas corpus the petitioner will only be discharged in the event the statute on which the offense is founded, is held to be void. As said by Mr. Justice Harlan in Ex parte Royal, 117 U. S. 241, "If the local statute under which Royal was indicted be repugnant to the constitution, the prosecution against him has nothing upon which to rest and the entire proceeding against him is a nullity." And further: "An unconstitutional law is void and is no law. The offense created by it is no crime. A con-

viction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment." And again in Ex parte Parks, 93 U. S. 18, Mr. Justice Bradley, speaking for the court, said: "Now it has always been held that a mere error in point of law, committed by a court in a case properly subject to its cognizance, can only be reviewed by the ordinary methods of appeal or writ of error; but where the proceedings are not only erroneous, but entirely void,—as where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence,—the Superior Court, or judge invested with the prerogative power of issuing a *habeas corpus*, may review the proceedings by that writ, and discharge from illegal imprisonment."

The same conclusion was reached in Ex parte Fredrich, 149 U. S. 169.

Counsel for the plaintiff in error admitted in the State Stpreme Court that the original statute was valid, and it is in now contended by counsel that the original statute was subject to attack. We again call attention to the expression of Judge Jones in the Peonage Cases: "It (the original statute here involved) applies to all classes of persons who commit the designated offense, and does not single out any particular class. *This statute is constitutional. Persons duly convicted of violating its provisions, and put to labor in consequences are lawfully undergoing involuntary servitude.*" 123 Fed. 671, 650.

In the brief of the Attorney General of the United States as *amicus curiae*, this statute seems to be under attack; and the opinion of Judge Jones in the Peonage Cases relied upon. But we cannot see how the contention is of force. Judge Jones distinctly held the orig-

inal law to be good, and there is no case, so far as we are advised, which tends to support the invalidity of such a statute.

The North Carolina case referred to by the Attorney General simply makes a *willful* abandonment, a criminal offense, without reference to any element of fraud; and the South Carolina statute is to the same effect, as will be observed upon a reading of the cases in which the statutes were considered. *In no case has any court held a similar statute to be invalid in which a fraudulent intent is required to exist as one of the elements of the offense.*

Assuming then the validity of the original statute, we submit that the rule of evidence subsequently declared is not now subject to review. The existence of that rule has not affected any right, title or immunity of this plaintiff in error. The rule can only become operative upon the final trial of the defendant. If on such trial the State should *fail* to offer evidence tending to show a fraudulent intent, the defendant could then raise the question of the validity of that part of the statute which declares a rule of evidence. For if invalid, and the same is successfully invoked against him, he will then have been affected by its operation. In the present case no such condition exists.

As we pointed out in our original brief, the identical point we are now considering was suggested by Judge Showalter in Dryer v. Pease, 88 Fed. 978. The validity of the statute for the protection of bank depositors was sustained. In one and the same act a prima facie rule of evidence was established. The defendant sought his discharge on habeas corpus. Judge Showalter said: "As concerns the last sentence of the section, I do not think any question can properly arise in this proceed-

ing. The State is not obliged to make use of—and may not choose or be able to use—the rule of evidence there defined. That it will be able to make out a case, or what evidence the prosecuting attorney will introduce, cannot now be known." And so in the case at bar, the State of Alabama on the trial of the defendant may not choose or be able to use the present rule of evidence. Certainly the existence of that rule is not here involved.

THE PEONAGE STATUTE.

The Attorney General insists that the statute in question is violative of Section 1990 of the Revised Statutes. This contention was not made in the Court below. At no stage of the case, until the present time, has it been intimated that the Alabama statute was violative of the Federal law on the subject of peonage. In fact, it is very clear from the briefs of counsel for plaintiff in error as well as from the entire record in the case that, in the beginning the attack was made only upon the amendments to the original statute. In this condition of the record the present question will not be re-examined.

Caperton vs. Boyer, 14 Wal. 216.

If this question is considered by the Court, we submit that the statute can in no sense be held to violate Section 1990 of the Revised Statues. The very basis of the present argument against the validity of the statute is, *not that the rule of evidence* subjects the convicted defendant to a condition of peonage, but that *the original statute* has that effect. And unless the court holds the original statute to be invalid, there can be no condition of peonage incident to a conviction thereunder. The rule of evidence does not of itself or as an amendment to the original statute make a condition of peonage.

SYNOPSIS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 538.

ALONZO BAILEY,
Plaintiff in Error.

vs.

THE STATE OF ALABAMA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

The plaintiff in error sued out a writ of habeas corpus before the Hon. William H. Thomas, Judge of the City Court of Montgomery, alleging that he was impris-

oned by the Sheriff in the jail of Montgomery County, Alabama, under a commitment issued by a Justice of the Peace, and praying that upon the hearing of the petition he might be discharged from the custody of the Sheriff. (R. p. 1.)

On the hearing of the writ of habeas corpus, it appeared that the petitioner had been committed to jail, by a Justice of the Peace, after a preliminary examination, for the offense of obtaining fifteen dollars under a contract in writing with intent to injure or defraud his employer, in violation of Section 4730 of the Criminal Code of Alabama of 1896 as amended by the Act of the Legislature of Alabama, approved October 1st, 1903, (General Acts 1903, p. 345) and as last amended by the Act of the Legislature of Alabama approved August 15th, 1907, (General Acts 1907, p. 636).

It was admitted on the hearing by the petitioner Bailey and the State that but one witness, H. C. Borden, was examined on the preliminary trial of Bailey before the Justice of Peace, and the testimony of that witness was again offered on the hearing of the habeas corpus writ. No other evidence was offered on such hearing, except the written contract, which recited that in consideration of fifteen dollars in hand paid to Bailey by the Riverside Company, on the date of the contract, the said Bailey did "consent, contract and agree to work and labor for the Riverside Company as a farm hand on their Scott's Bend place in Montgomery County, Alabama, from the 30th day of December, 1907, to the 30th day of December, 1908." The record then recites:

> "The above contract was introduced in evidence and witness further testified that Alonzo Bailey had obtained from the Riverside Co. at the time of entering into the contract fifteen dollars; that the

said Alonzo Bailey had worked for the said Riverside Company during the month of January, 1908, and two or three days in February, 1908, and since that time Alonzo Bailey had not performed any service for the Riverside Company, in accordance with the said contract; that the said Alonzo Bailey had not refunded the said fifteen dollars to the said Riverside Company and was at present indebted to the Riverside Co. in the sum of about $20.00. The same being the $15.00 obtained by defendant of the employer Company at the time of execution of contract and advances made him over and above the value of the labor he did perform under the contract, and that witness nor the Riverside Co., or its authorized agents had given the petitioner just cause for quitting the said service or failure—such contract". (R. p. 4.)

Thereupon Bailey moved for his discharge on nine grounds but the motion was overruled. On appeal the Supreme Court of Alabama affirmed the action of the trial Judge, and the petitioner then sued out the present writ of error to this Court.

THE STATUTORY OFFENSE.

The law under which this prosecution was begun had its origin in the Act of the General Assembly of Alabama, approved Feb. 17, 1885, (Acts 1884-5, p. 142), being an act to amend Section 4370 of the Code of 1876. That Section, 4370 of the Code of 1876, before the same was amended, was in the following language:

"Any person who, by any false pretense, or token, and with the intent to injure or defraud, obtains

from another any money or other personal property, must, on conviction, be punished as if he had stolen it."

The Act of Feb. 17, 1885, above referred to amended said Section 4370 of the Code of 1876 so as to read as follows, the new matter in italics:

"Any person who by false pretense or token and with the intent to injure or defraud, obtains from another any money or personal property or *any person who has entered into a written contract, with, at the time, the intent to defraud, to do or to perform any act or service and in consideration thereof obtains from the hirer money or other personal property, and who abandons the service of such hirer without just cause, without first repaying such money or other advances, and with the intent to injure or defraud,* must, on conviction, be punished as if he had stolen it."

In the Code of 1886 Section 4370 of the Code of 1876 as thus amended became two sections, namely, sections 3811 and 3812, the former, 3811, being identical with the original section 4370 of the Code of 1876; and the new matter added by the Act of Feb. 17, 1885, constituting a new Section, 3812.

Section 3812 of the Code of 1886 now appears as Section 4730 of the Code of 1896.

The Act of the Legislature approved October 1, 1903, (General Acts 1903, p. 345) amended said Section 4730, of the Code of 1896, so as to read as follows, the new matter being in italics:

"Any person who with intent to injure or defraud his employer, enters into a contract in writing for

the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act, or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

The Act of August 15, 1907, (General Acts 1907, p. 636) further amended said section 4730 so that as amended the same reads as follows, the new matter being in italics:

"Any person who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished *by fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured; and any person, who with intent to injure or defraud his landlord, enters into any contract in writing for the rent of lands, and thereby obtains any money or other personal property from such landlord, and with like intent, and without just cause, and without refunding such money,*

or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be punished by fine in double the damage suffered by the injured party, but not more than $300.00, *one-half of said fine to go to the county and one-half to the party injured.* And the refusal or failure of any person who enters into such contract, to perform such act or service *or to cultivate such land*, or refund such money, or pay for such property, without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*"

This statute now appears as section 6845 of the Code of 1907, but the Code was adopted before the act was passed, and is printed in the Code for convenience merely.

We have set forth in detail the history of this legislation in order that the questions raised may be considered in the light of and with reference thereto.

This case being brought to this Court by writ of error to the Supreme Court of Alabama, the jurisdiction of this Court "is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State is not open to us."

Yick Wo v. Hopkins, 118 U. S. 360; 30 L. 220;
Barbier v. Connolly, 113 U. S. 27; 28 L. 923.

The plaintiff in error now insists upon six grounds of defense (R. ps. 12 and 13) and this Court is confined to a consideration of the questions raised thereby.

The first and second grounds urged by plaintiff in error raise questions of fact which are disposed of, if the *prima facie* presumption, which follows from the proof of certain facts, is sustained.

The third ground of defense assails the Act of August 15, 1907, for that it is alleged to deprive plaintiff in error of his liberty without due process of law in violation of section six of the Constitution of the State of Alaama. But as before pointed out the question of whether the Act is violative of the Constitution of Alabama is not open to this Court. In the case at bar, as well as other cases, that court has expressly held the Act good against every question raised by the six grounds referred to above.

Bailey v. State of Ala. (Case at bar);
State v. Vann, 43 So. (Ala.) 357;
Thomas v. State, 144 Ala. 77;
McIntosh v. State, 117 Ala. 128;
Ex parte Riley, 94 Ala. 82.

DUE PROCESS OF LAW.

The fourth ground urged is that the Act in question violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no State shall deprive any person of life, liberty or property without due process of law.

This Court has many times defined the meaning of the terms "due process of law." In Dent v. West Virginia, 129 U. S. 128, 32 L. 623, Mr. Justice Field said:

> "They (the terms, due process of law) come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the

subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation upon the subjects to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case.* The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

And in Leeper v. Texas, 139 U. S. 462, 35 L. 225, Mr. Chief Justice Fuller said with reference to the power of the State in dealing with crime:

"That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requirement is satisfied; *and that due process is so secured by laws*

operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

In order for the State to obtain the benefit of the prima facie presumption under the Act in question, it will be necessary to prove on the final trial of the plaintiff in error that he entered into a contract in writing to perform service for the Riverside Company and thereby obtained money from such Company and that without just cause and without refunding the money he refused or failed to perform the service. Every fact which enters into the offense, except the intent to injure or defraud, must be proven before this presumption obtains. And the question is thus presented whether this statute, which declares such a rule of evidence, deprives the plaintiff in error of life, liberty or property without due process of law.

POWER TO ESTABLISH PRIMA FACIE RULE OF EVIDENCE.

We think it may be stated as a general proposition of law that the right of the Legislature to establish a prima facie rule of evidence in criminal cases has been recognized by every court, state and federal, in which the question has been presented, and among such cases we cite the following:

Li Sing v. United States, 180 U. S. 485, L. 634;

Adams v. N. Y. 192 U. S. 585, 48 L. 515;

Ah How v. United States, 193 U. S. 65, 48 L. 619; 48 L. 619;

Fong v. United States, 149 U. S. 697, 729, 37 L. 905, 918;

Commonwealth v. Williams, 6 Gray (Mass.) 1;
State v. Beach, 147 Ind. 74;
State v. Buck, 120 Mo. 479, 25 S. W. 573;
State v. Kingsley, 108 Mo. 135, 18 S. W. 994;
Meadowcroft v. People, 163 Ill. 56;
Barker v. State, 54 Wisc. 368;
Robertson v. People, 20 Colo. 279;
Voght v. State, 124 Ind. 358;
People v. Cannon, 139 N. Y. 32;
Board of Commissioners v. Merchant, 105 N. Y. 148.

The validity of this provision of the statute has been considered and upheld in three different cases by the Supreme Court of Alabama:

Bailey v. State, (at bar);
State v. Vann, 43 South. (Ala.) 357;
State v. Thomas, 144 Ala. 77.

The question was first presented in State v. Thomas, 144 Ala. 77, supra, and the Court sustained the power of the Legislature to declare a prima facie rule of evidence and quoted and in effect adopted the rule as laid down in 8 Cyc. 820, using this language:

> "The Amendment of Section 4730, which section simply declares the intent, declares a prima facie rule of evidence in such cases. In 8 Cyc. 820, it is said, 'The Legislature has the power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings it may declare what shall be prima facie evidence. On the other hand, it cannot prescribe what shall be conclusive evidence as this would be an invasion of the province of the judiciary'. This seems to be a rule

> of well-nigh, if not of universal recognition. Citing, State v. Beach, 147 Ind. 743, 6 L. R. A. 179; Meadowcroft v. People, 163 Ill. 56, 67; Fong v. United States, 149 U. S. 697, 759; 37 L. 905.

And again in State v. Vann, 43 South. (Ala.) 357, supra, the court upheld the statute good as against this attack, in this language:

> "The amendment is a mere rule of evidence and has been upheld by this court in the case of State v. Thomas, 40 South. 271, 144 Ala. 77, 2 L. R. A. (N. S.) 1011, the soundness of which is not challenged by counsel."

In the case at bar the court, in a well considered opinion by Judge Denson, again expressly reaffirmed the former cases and cited, among other authorities, Banks v. State, (Ga.) 52 S. E. 74, 2 L. R. A. (N. S.) 1007.

In Banks v. State, supra, the Supreme Court of Georgia considered and upheld a statute having the same object as the Alabama statute under consideration, and upheld that feature, declaring the presumption which should follow from certain facts. In that case the statute provided that proof of the contract of hiring, the procuring thereon of money or other thing of value, the failure to perform the service so contracted for or to return the money so advanced with interest thereon to the time the labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, should be presumptive evidence of the fraudulent intent. After reviewing the cases, the Court said:

> "This is not an assumption of judicial functions by the Legislature. It declares a rule of evidence

> under which certain acts are deemed presumptive evidence of a fraudulent intent in committing them. The legislature has the power to establish rules of evidence. * * * The power of the Legislature on this subject is not so extensive in regard to criminal cases as in regard to those of a civil character. This, to illustrate, in the former the accused must be confronted with the witnesses. But the power to make rules of evidence, where not conflicting with any constitutional provision or right, exists in respect to both classes of cases".

In Fong v. United States, 149 U. S. 697, 729, supra, thi sCourt considered the Act of May 5th, 1892, being an act to prohibit the coming of Chinese persons into the United States. The Act provided that Chinese laborers then in the United States and who were entitled to remain, should, within six months after the passage of the act, obtain a certain certificate; and that if any such laborer neglected, failed or refused to comply with the act, and be found within the jurisdiction of the United States after the time named without such certificate, he should be deemed and adjudged to be unlawfully within the United States, *unless he should establish clearly to the satisfaction of the judge* "that by reason of accident, sickness or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States Judge and by at least one credible witness other than Chinese, that he was a resident of the United States on the 5th day of May, eighteen hundred and nenty-two". The Court said with respect to this feature of the law:

> "The provision which puts the burden of proof upon him of rebutting the presumption arising from

his having no certificate as well as the requirement of proof by at least one credible white witness, that he was a resident of the United States at the time of the passage of this Act, is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its owngovernment".

In Li Sing v. United tSates, 180 U. S. 485, supra, this Court, speaking through Mr. Justice Shiras, again upheld this feature of the law quoting the language of the Court in Fong's case.

In Adams v. N. . 192 U. S. 585, supra, the Court considered a statute of New York which made the possession of the record of chances or slips in the game of policy or the possession of any paper, print, or writing commonly used in playing or promoting that game prima facie evidence of "possession thereof knowingly", in violation of the statute. Mr. Justice Day, speaking for the Court, said:

> "Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. *Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government*".

In the case of Commonwealth v. Williams, 6 Gray (Mass.) 1, supra, the Court held valid a statute which declared that the delivery of spirituous liquor in any place other than a dwelling house should be deemed prima facie evidence of a sale. The Court said:

"The statute only prescribes, to a certain extent, and under particular circumstances, what legal effect shall be given to a particular species of evidence, *if it stands entirely alone and is left wholly unexplained.* This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof remains continually upon the government, to establish the accusation which it makes. * * * The only purpose and effect of the particular clause of the statute objected to are, *to give a certain degree of artificial force to a designated fact, until such explanations are afforded* as to show that it is at least doubtful whether the proposed statutory effect ought to be attributed to it; but the fact itself is still to be shown and established by proof sufficient to convince and satisfy the minds of the jurors".

Mr. Justice Thomas dissented in this case and his opinion contains all that can be said against the validity of this kind of legislation. Among other things, he argued with some vigor that the delivery of liquor was an act perfectly innocent,—being an element alike of a gift, bailment and sale. But the court sustained the prima facie presumption which the Legislature sought to give to such act of delivery.

In Board of Commissioners v. Merchant, 103 N. Y. 143, supra, the Court considered and upheld a statute which required an applicant for a liquor license to execute a bond conditioned that he would not sell liquors to be drank on his premises and that when any person was seen to drink on the premises that fact should be prima facie that the same were sold with the in-

tent that they should be drank thereon. It was contended by counsel for appellant that the last mentioned provision of the statute violated the constitutional guaranties of due process of law and trial by jury. In a well considered opinion, the court touched upon the power of the legislature to declare a prima facie rule of evidence and stated the limitations on such power. We quote the same in part:

> "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act and no tendency by itself to prove a criminal act. *But so long as the legislature, in prescribing rules of evidence in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds*".

In People v. Cannon, 139 N. Y. 32, supra, the court considered an act to protect owners of bottles. The act provided that such owners should file a description of the name, marks or devices used on the bottles and that

after such filing it should be unlawful for any person than the owner to use any such bottle; that the possession thereof, without the written consent of the owner, should be presumptive evidence of the unlawful use, purchase and traffic in and of such bottles. The court sustained the power of the Legislature to declare that the facts mentioned when proven should be prima facie evidence of a violation of the act in an elaborate opinion by Judge Peckham, now Mr. Justice Peckham of this Court. We have been unable to find any case in which the limitations on this power are more accurately or clearly stated, than in the opinion of Judge Peckham, and we quote the same in part:

> "It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y. 143, *supra*). The limitations are that the fact upon which the presumption is to rest must have some fair relation of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper.
>
> A provision of this kind does not take away or impair the right of trial by jury. It does not in

reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory prima facie evidence were uncontradicted."

In State v. Beach, 147 Ind. 74, supra, the court considered a statute which provided that the failure of a banker within thirty days after receiving a deposit, should be prima facie evidence on the part of the banker of an intent to defraud at the time of receiving the deposit. The court said, at p. 83:

> "The statute enables the State to make prima facie proof of the intent to defraud by showing the failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank, as the case may be, within thirty days after the deposit was received."

In an elaborate opinion the court considered this question, citing and quoting from many cases and held the statute to be valid.

In the case of State v. Buck, 120 Mo. 479, 25 S. W. 573; State v. Satterly, 131 Mo. 464; Robinson v. People, 20 Colo. 279; Meadowcroft v. People, 153 Ill. 56; Bar-

ker v. State, 54 Wisc. 368, the several courts considered banking statutes in terms almost identical with that held good in State v. Beach, supra, and in every instance the same were sustained.

In the case of State v. Kingsley, 108 Mo. 135, supra, the court considered a statute which provided that every person who should obtain board or lodging by means of any trick or deception or false of fraudulent representation and should fail or refuse to pay therefor should be held to have obtained the same with intent to cheat or defraud and that proof of the facts mentioned should be prima facie evidence of the intent.

From this review of the authorities, the general rule seems to be that the legislature may establish a prima facie rule of evidence and the only limitation on this right to do so is laid down in the case of Board of Commissioners v. Merchant, 103 N. Y. 143, supra.

In the case at bar, every fact and condition which enters into the crime, except the intent, must be proven by the State before the rule of evidence obtains and the presumption of guilt follows. In every case which we have cited and quoted from above, the question of fraud or criminal intent was involved, and under the rules established by the several statutes there considered, such intent was required to follow from certain facts. We will consider briefly in this light the cases involving the banking statutes. Here it is merely the failure of a bank within thirty days after receiving a deposit, which so many of the courts have held will sustain a prima facie rule of evidence from which guilt follows. Considered in and of itself, the failure of a bank within thirty days after receiving a deposit, does not constitute a fraud. In the absence of the rule of evidence established, the State could not succeed in a conviction on merely proving those facts. And so with the case of

Commonwealth v. Williams, supra. The mere fact of delivering the liquors is an innocent act. It is entirely consistent with a gift or a bailment, and yet in one of the best considered opinions to be found on this subject, the Supreme Court of Massachusetts upholds the law. If we consider the case of People v. Commenwealth, supra, we have the same conditions. Here was an act to protect owners of bottles, and the mere possession of a marked bottle was held to constitute prima facie evidence of the guilt of the possessor. The person in possession may have found the bottle, or acquired it in many other ways not inhibited by the statute and yet the New York Court held the statute good against this attack. The case of Commissioners v. Merchant, supra, involved facts as far reaching as any case and yet the rule was sustained by the New York Court. The mere fact that a person was seen to drink on the premises was the fact that made the owner of the premises prima facie guilty.

It is important for this Court, at all times, to keep steadily in view, the fact that the plaintiff in error applied for his discharge, on habeas corpus, and before final trial; that on the hearing of his writ the testimony of but one witness was offered, namely, Borden, the State witness; that the defendant did not testify, nor did he offer to testify, although under the laws of the State of Alabama a defendant is a competent witness in his own behalf. (Code of Alabama of 1896, Sec. 5227; Code of 1907, Sec. 7894).

It is idle talk for the plaintiff in error to insist before this Court that he was in no position to prove his innocence, forsooth, there was no witness to the making or recission of the contract. There is no evidence in the record showing or tending to show that there was no witness by whom those things could be proven. *To*

the contrary, the defendant voluntarily rested the case when the State's witness testified. The State could not force him to give evidence against himself. He had the right to testify under the laws of Alabama, or to refuse to do so, at his own election.

But, assuming that there are no witnesses by whom the making or recission of the contract may be proven, the defendant loses sight of the fact that he is a competent witness in his own behalf and that the jury are the judges of the credibility of the evidence as between himself and other witnesses. He has every right and guarantee under the law that any other defendant in any criminal case could have. Furthermore, the plaintiff in error confuses the facts of a particular case with a general principle. If the principles on which this case must rest are well founded, it is wholly immaterial what the effect may be in a particular case. The courts cannot look to such a condition as that nor can principles be changed and turned for the benefit of mere individuals. To permit it to be done would bring about the very condition which the plaintiff in error is suggesting in this case, namely, that he is deprived of the equal protection of the law; not on his own part but on the part of those who would be less favored. The law is not responsible for his inability to prove his innocence by independent evidence.

Nor can we see the releyancy in this connection of the defendant's contention that by reason of a rule of decision in Alabama preventing him from testifying to his secret and uncommunicated motive and intention, he was deprived of his life or liberty without due process of law. It is admitted that this is the law of Alabama, but if the effect of this rule is to deprive the plaintiff in error of his liberty without due process of la *it must likewise have the same effect in any other*

prosecution. A case might be assumed wherein the defendant, under an indictment for murder, was the sole witness in his own behalf and yet, under the rule referred to, he would be excluded from testifying to his secret intention. This fact, however, could not destroy the rule which would so prevent his testifying nor could it destroy the statute under which he was indicted.

Moreover, if there are no witnesses to the making and recission of the contract, and if the defendant by reason by the rule of decision referred to, cannot overcome the prima facie case made by the State, it does not follow that every subsequent case that may come under the law will be thus affected and the court could not on these facts hold the law void.

But so far as the last contention mentioned is concerned, the answer to that, if anything more were needed, is that the defendant did not offer to testify in the case and is in no position to complain of error in this respect. His counsel present a moot case. It is argued that the rule of evidence which excludes the defendant from testifying to his motives, has the effect of making the rule of evidence prescribed by the statute, a conclusive rule. But if it is in effect a conclusive rule in the case at bar, it is due to the particular facts and not to the statute itself. As before pointed out, the defendant had the right of testifying to the facts that led up to his failure or refusal to perform his service under the contract.

Adverting again to the statute under consideration, as we have before pointed out, three conditions of fact must be proven before the prima facie rule of evidence is set in operation, namely a written contract to perform labor, the obtaining of money on the faith of the contract and the refusal by the defendant, without just

cause and without refunding the money, to perform the service. Abstractly speaking, is it far fetched to say that from these facts a prima facie presumption of fraud may arise? They are certainly stronger in their effect than the facts on which many of the cases referred to above are based. This rule of evidence does not shut out the testimony of the defendant. He has the opportunity of testifying for himself at and through a trial held in the usual mode. It cannot be contended that under the law the defendant had no control over the facts which are the basis of the offense, nor that he had no connection with such facts, for the reverse of those conditions is patent on the record. Nor can it in truth be said that the several conditions of fact which the State must first prove have no relation to a criminal act. *The statute was designed to punish fraud in entering into a contract of employment and thereby obtaining money.*. The facts referred to constitute the offense, except the element of fraudulent intent, which must follow from the facts. The intent with which an act is done can never be proven, but must follow from facts in evidence. In prescribing the present rule of evidence, the Legislature has left a full and fair opportunity to the defendant to make his defense and submit all the facts to the jury to be weighed by them.

As is well pointed out in 24 Cyc. 192, a prima facie rule of evidence in a criminal case "does not overcome the presumption of innocence or change the burden of proof or require the jury to convict, unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt." The present statute comes directly within this principle of law on which reliance is placed by plaintiff in error. Proof of the constituent facts of the offense merely calls upon the defendant to explain those facts. Has the Legislature *in any case*

the right to say that certain facts shall constitute a crime? If so, it may declare the constituent facts of the crime which shall be prima facie evidence of the criminal intent.

The main fact involved in the present offense is the intent to defraud. It cannot rightly be said that the facts relied on to establish the prima facie evidence of that intent have no fair relation to or connection with the main fact. If the offense can exist at all, the facts relied on not only have relation to the intent but are immediately and directly connected with it.

Nor does the presumption of innocence attend a defendant throughout the whole trial but only "*until sufficient evidence is introduced to overcome the proof which the law has created.*" Coffin vs. United States, 156 U. S. 453.

Moreover, whether the facts are consistent with innocence, is a conclusion for the jury to draw; and they may, notwithstanding the present rule of evidence, find the defendant not guilty. It is the duty of the jury to consider all the evidence in the case, and to find the defendant not guilty if a reasonable doubt arises out of any part of the evidence. As said by Chief Justice Stone, in Hurd v. State, 94 Ala. 100, "It is certainly the duty of the jury, in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. * * * The jury would be derelict, if a segregated part of the testimony were made the basis of a verdict, without at least considering what influence should be accorded to other testimony in the cause. * * * And this rule applies in all issues submitted for decision, without reference to the parties, their pursuits, race or condition in life; for all have equal rights before the law."

Under an indictment for larceny, certain presumptions arise against the defendant from the recent possession of stolen goods. As said by Judge Brickell, in Martin v. State, 104 Ala. 78, "It is the settled law of this State, that the recent possession of stolen goods, imposes on the possessor the onus of explaining the possession; and, if he fails to make a reasonable explanation, raises a presumption of guilt, which will support a verdict of guilty."

At the same time, our Court recognizes the doctrine of the presumption of innocence. See Newsom v. State, 107 Ala. 133, 139.

A rule of evidence, whether established by statute or decisions, is entirely consistent with that presumption.

The refusal or failure to perform the act or service is by the statute made prima facie evidence of the intent to injure or defraud the employer. The question may be suggested, what intent to defraud is here referred to? The answer will be found in the opening clause of the statute, namely, the intent to defraud at the time of entering into the contract; and the further and like intent which must exist at the time of the refusal or failure to perform. The offense would have been complete without any reference to the intent that might exist at the time of the failure or refusal to perform. The Legislature has gone further than was necessary in declaring the offense.

EQUAL PROTECTION OF THE LAWS.

In the case of Moore v. Missouri, 159 U. S. 673, 40 L. 301, Mr. Chief Justice Fuller said with respect to this question:

> "The 14th Amendment means 'that no person or class of persons shall be denied the same protection

> of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances' * * * The general doctrine is that that amendment, in respect to the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses".

It is contended that the act in question violates the Fourteenth Amendment in the respect under consideration in that it applies only to persons who enter into contracts in writing for the performance of an act or service or for the rent of lands, that it does not bear equally upon the employee and employer and that it is applied only against farm laborers and the colored race.

As we pointed out before, the statute had its origin as an amendment to the statute punishing the obtaining of money or other personal property by false pretenses. Every person within the State of Alabama is subject to punishment for obtaining money by false pretense and it is not contended that that statute denies to any one the equal protection of the laws.

The present statute, on its face, likewise applies to every person who with a fraudulent purpose enters into a written contract to perform an act or service for another, and thereby obtains money. So that we come to the question of the right of the Legislature to classify objects of legislation. With respect to this question Mr. Justice McKenna said in Clark v .Kansas City, 176 U. S. 144, 44 L. 392:

> "It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. It is not a substitute for mu-

> nical law; *it does not invest power in this Court to correct the impolicy and injustice of State laws,* and the equality it prescribes is not for persons merely as such, but according to their relations."

And in Magoun v. Illinois Trust & Saving Bank, 170 U. S. 282, 42 L. 1037, the same Justice said:

> "It (the 14th Amendment) does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. With these for illustration, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude so far as interference by this Court is concerned. * * * Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile County v. Kimball, 102 U. S. 704, that this Court is not a harbor in which can be found a refuge from ill advised, unequal and oppressive State legislation."

So it is well settled that the Legislature may classify the objects of its attention, and the only limitation upon that right is that there must be no arbitrary selection of the class brought within the statute.

As an illustration of an improper exercise of this right of classification, we refer to Gulf, etc. Company v. Ellis, 165 U. S. 150, 41 L. 666, in which the majority of the court held a statute unconstitutional which imposed an attorney's fee on railroad corporations omit-

ting to pay certain claims within a certain time, which applied to no other corporation or individuals. The distinction between the present case and the case cited is clear. We venture to say that no case can be found in the decisions of this Court holding a statute in any way similar to that here involved, to be an arbitrary selection or classification.

It is next contended that the statute does not bear equally upon the employee and employer. The purpose of the statute is to punish the obtaining of money by fraud. The employer in every case under the statute is the victim of the fraud. How can any case arise in which the employer is guilty of a false pretense in this connection toward his employee? The employee loses no money, to the contrary he gains an advantage over the other party. It may be contended with as much reason that the person who parts with his money on a false representation of fact, should be subjected to some kind of punishment.

We stop here to quote the language of Judge Showalter in Dreyer v. Pease, 88 Fed. 978, concerning the Illinois banking statute:

> "The law here in question is applicable to any person whose conduct falls within the definition of the offense. How wide or how narrow that definition shall be is a question for the Legislature. * * * *I am not able to say that taking money as a deposit by an insolvent banker under pretense of solvency is a right guaranteed by the fourteenth amendment. A law which makes the obtaining money by false pretense a crime would hardly be invalid on the ground that a person using the same pretenses, but failing to obtain and appropriate money or property thereby, would not be punishable.* The cir-

cumstances that, by the terms of the statute in question, the repayment on demand must be lost to the depositor in order to make the offense, is not a valid objection. *Nor as long as any person whose conduct falls within the definition of the offense is liable to the penalty prescribed do I see that the equal protection of the laws is denied.* * * * The penalty of the statute here in question goes without discrimination against any person whose conduct falls within the definition of the offense."

And we also call attention to the concluding clause of Judge Showalter's opinion concerning the prima facie rule of evidence established by the Illinois Statute. His remarks are pertinent to this case: "The state is not obliged to make use of—and may not choose or be able to use—the rule of evidence there defined. That it will be able to make out a case, or what evidence the prosecuting attorney will introduce, cannot now be known." How does this Court know at this stage of the present case what evidence the State of Alabama will be in position to offer on the final trial?

Finally, it is urged that the statute is applied only against farm laborers and the colored race and is violative of the equality clause of the Constitution for that reason. The studious and determined effort of counsel for plaintiff in error to confine the statute to a particular class within the State of Alabama, is wholly unwarranted by the statute or any suggestion in this record. On the trial below it was not even intimated that the statute was unfairly executed or that in its enforcement it was made to operate only against the class mentioned.

In Soon Hing v. Crowley, 113 U. S. 703, 28 L. 1145, this Court considered an ordinance of the city and county of San Francisco which had to do with public laun-

dries. The principle objection to the ordinance on the part of the petitioner was, as pointed out by Mr. Justice Field, "founded upon the supposed hostile motives of the supervisors in passing it", and that learned jurist then said:

> "There is nothing, however, within the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. * * * The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, *unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense*".

And see to the same effect Tinsley v. Anderson, 171 U. S. 101, 43 L. 91.

The present contention is wholly without merit. *This Court will examine the record in this case in vain for any suggestion that the plaintiff in error is a member of the colored race.* For aught that appears, Bailey may be a white man. And in this condition of the record the contention may be passed without further discussion. But assuming the facts in that regard to be otherwise than as presented, we answer the contention with the rule laid down by Mr. Justice Field in Soon Hing v. Crowley, supra, that there was no pretense in the court below, that in its enforcement the law was made to operate only against farm laborers and the negro race. This Court cannot act on a suggestion of counsel nor will it

declare a State statute unconstitutional upon such suggestion.

On the face of the statute, the clerk in the store or other mercantile business is as much within its terms as the farm laborer; and there is in the statute no distinction made as to race or color. We will be pardoned, therefore, for suggesting that the only possible field of operation for the argument on the part of counsel for plaintiff in error is to engender a bias in the mind of this Court in favor of the negro race, and to the prejudice of the law of Alabama; and we apprehend that this Court will not be moved by such an appeal, nor will its mind be clouded by such an argument.

It could never have been the purpose of the 14th Amendment to require the Legislature to enact a statute punishing every conceivable offense and the fact that no law exists on the point suggested by counsel, namely, against the employer who obtains service with the fraudulent purpose not to pay for the same, is no argument against the validity of the present law. It is of no more value than an analogy that might be drawn from the failure of the Legislature to punish any other offense which might be conceived of.

There is in Alabama a statute enacted under the title, "For the protection of landlords, proprietors or keepers of hotels and boarding houses," and punishes anyone who by fraud or misrepresentation obtains board or lodging. Construing this statute, our Court has said that it "is no more of a special privilege to the hotelkeeper, than the statute against burglary from a store or a dwelling, is to the merchant who owns the store, or to the owner of the dwelling." Exparte King, 102 Ala 182.

INVOLUNTARY SERVITUDE.

Neither the original nor the amended statute punishes the plaintiff in error for debt. The 13th Amendment provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United Stats, or any place subject to their jurisdiction."

In the brief of counsel for appellant filed in the State Supreme Court, it was admitted that "the statute herein questioned was a valid statute prior to the amendment of 1903". And indeed the admission was entirely correct. But as the proposition which we are now considering may involve the original statute, we will briefly touch upon its validity.

If the statute now before the Court provides a punishment for crime, it is a valid enactment so far as the 13th Amendment is concerned.

In Ex Parte Riley, 94 Ala. 82, after quoting the statute, the Court said:

> "The effect of this statute is to provide for the punishment criminally of a certain class of frauds which are perpetuated by means of promises not meant to be kept. These frauds closely resemble those perpetrated by means of false pretenses or tokens, but are not punishable under the statute on that subject, as a false pretense is a false representation relating to some existing or past fact, and does not include a promise of something to be done in the future. * * * A mere breach of a contract is not by the statute made a crime. *The criminal feature of the transaction is wanting unless the accused entered into the contract with intent*

to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause."

Again in State vs. Vann, 43 Sou. (Ala.) 357, the Court pointed out that "Under the former construction of the statute by this Court, while the essence of the crime is a fraudulent intent, the statute is intended to prevent fraud and not to imprison for debt."

And in the case at bar Judge Denson, after reviewing the cases, held that:

> "It is within legislative competency to enact a law penalizing the entering into a contract, with such intent, (to perpetrate a fraud) and obtaining money or other personal property through such agency.
>
> "This is all that is effectuated by the legislation in question. On its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional."

Without further discussing this question we think it clear that the original statute was a valid enactment, for that its purpose was to punish fraud.

And we are unable to see how the amendment to the statute has changed its purpose in that respect. The rule of evidence as it now exists does not take away the fraud which must be involved in such case. The jury is at all times at liberty to find a defendant not guilty even though he fails to testify.

The statute we are now considering is wholly different from the law held to be obnoxious to the State constitution, in Toney v. State, 141 Ala. 120; and in the Peonage Cases, 123 Fed. 671. As said by Judge Denson

in the case at bar, the "*intent to injure or defraud* marks the line of cleavage between the statute in judgment and the one" held bad in Toney's case, supra.

Mr. Ball in his brief for plaintiff in error sets forth what he terms six practical applications of the statute. In each instance he presents the cause for quitting as a part of the case which he says constitutes the prima facie evidence of the fraudulent intent. The fallacy of this argument lies in the fact that in almost every instance mentioned by him the excuse which the employee may have for quitting the service would constitute a good cause therefor, if not as a matter of law to be so held by the court, certainly as matter of fact which any jury of intelligent men would sustain. The present plaintiff in error does not bring himself within any of the illustrations so used by counsel. They each constitute a moot case and a very extreme application of the law. Almost any criminal statute can by this ingenious argument be subjected to such an attack.

And it is further contended by counsel that the statute was not meant either to prevent employees from making fraudulent contracts or to prevent them from obtaining money by promising service. The various excerpts from the decisions of the Alabama Supreme Court which are made use of by counsel, conclusively show that the statute had this purpose. In McIntosh v. State, 117 Ala. 128, Judge Brickell pointed out that "The rendition of service by the defendant for a period more than sufficient to have repaid the money takes away an essential ingredient of the offense". The Legislature saw fit to require several facts to exist before the offense was completed and among which was the non-payment of the money so fraudulently obtained. It might or not in its own discretion have

been just as competent for the legislature to provide that the employee should be guilty if he entered into the contract with a fraudulent purpose of obtaining the money—and did obtain the same, without giving him the benefit of a subsequent re-payment. *The offense is merely condoned in the event of such payment.* All of the present argument of counsel goes to the validity vel non of the original statute. In fact the greater portion of the argument for plaintiff in error necessarily comes to that question. The Alabama Court has pointed out time and time again that the *essential* ingredient of the offense is fraud in entering into the contract of employment. If ulterior motives and purposes on the part of the Legislature had existed in fact, it is strange that up to the present period such motives have failed of discovery by the Alabama Court. And yet several of the greatest jurists that the Alabama Supreme Court can claim, have passed upon and upheld the original statute. If the present statute is condemned, this Court should go further and destroy every statute which is aimed at the obtaining of goods of another by false pretenses. The victim in all such cases has a civil right of action against the party who thus obtains his money. But the fact of the existence of such civil right has never until this day been considered as depriving the State of its inherent right to punish the criminal act involved in that transaction. The fraudulent *violation* of the contract of employment was not and could not be made punishable criminally.

In the elaborate opinion of Judge Jones, in the Peonage Cases, he referred to the original statute here under consideration, and said:

> "It applies to all classes of persons who commit the designated offense, and does not single out any

particular class. This statute is constitutional. *Persons duly convicted of violating its provisions, and put to labor in consequence, are lawfully undergoing involuntary servitude*".

123 Fed. 671, 690.

Much reliance is placed by opposing counsel on the case of Carr v. State, 106 Ala. 35. But that statute did not involve a *fraudulent intent* on the part of the banking officer receiving the deposit and it is, therefore, distinguished from the present case. In the Carr case the Court held the statute to be violative of the provision of the Alabama Constitution against imprisonment for debt.

The Supreme Court has held that the present statute does not violate the Constitution in the respect mentioned. (Bailey v. State, (at bar); Vann v. State, 43 South. (Ala.) 357.) That holding is conclusive on this Court, there being no provision in the Federal Constitution against imprisonment for debt. Therefore, it must of necessity be the law that the statute does punish for a crime, and thus it is relieved from conflict with the 13th Amendment. This Court cannot hold the law to be violative of that amendment except upon the theory that it imprisons for a debt and that holding cannot be made consistently with the law as already established in this Court, namely, that the Federal Court must follow the State Court in the construction of its own Constitution and laws.

STATUTE NOT VOID FOR UNCERTAINTY.

The statutory words, "without just cause" are clear and definite. They refer to the refusal or failure to perform the service. It is left to the court or the jury in

each case to determine the justness of the cause for quitting. Under some conditions the court might decide the question as a matter of law; while again the duty might be left to the jury. And in any case, the cause would be sufficient which would authorize one party to a contract to terminate the same. This Court has construed the words "just compensation" as used in the Fifth Amendment, to "be a full and perfect equivalent for the property taken", and Mr. Justice Brewer said that the language of the amendment in this respect was "happily chosen." Monongahela Navigation Co. v. United States, 148 U. S. 310, 325-6. And so in the present case, the words "without just cause" will leave the question to be reviewed by the courts; and the language is in our judgment "happily chosen".

But the present attack on the statute should have been addressed to the State Courts. No Federal question is involved in its determination. And even if involved, the question was not suggested in the State Court and is now insisted on for the first time, and it is well settled that such questions will not be considered in this Court on a writ of error.

Caperton v. Bowyer, 14 Wall. 216.

We submit that the statute here involved should be upheld.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 538.

ALONZO BAILEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF AND ARGUMENT OF FRED S. BALL,
For Plaintiff in Error.

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STATEMENT OF THE CASE.

On April 6, 1908, Alonzo Bailey was committed to jail for an alleged violation of Section 4730 of the Code of Alabama of 1896 as amended, which is Section 6845 of the Code of 1907, and known as the "Labor Contract Law."

On *habeas corpus* proceedings before Honorable William H. Thomas, a Judge of the Montgomery, Ala. City Court, the validity of the statute was assailed upon the constitutional grounds hereinafter considered. Controlled by the recent decisions of the Alabama Supreme Court, the Judge upheld the law, his ruling was affirmed by the Alabama Supreme Court, and Bailey was denied his liberty.

Record pages 2-7.

The substance of the evidence is that on December 26, 1907, Bailey, in consideration of fifteen dollars then paid to him by Riverside Company, contracted in writing to work for it for twelve months from December 30, 1907, at $12 a month, the Company to pay him $10.75 each month; that he worked only one month and four days, had not, when committed, refunded the $15, and had no just cause for failing to perform his contract.

Record page 4.

A motion for his discharge was made in the *habeas corpus* proceedings upon the grounds that the evidence showed no intent to injure or defraud the Riverside Company either (1) at the time of making the contract, or, (2) at the time of the failure or refusal to perform the service, and, (3), that the statute under which he was held violated the Federal Constitution in several respects as set forth.

Record page 5.

It is perfectly plain that, unaided by the rule contained in the last sentence of the statute, the evidence is insufficient to support a conviction.

ASSIGNMENTS OF ERROR.

I. The said Supreme Court of Alabama erred in affirming the action of the court below.

II. The said Supreme Court of Alabama erred in not reversing the action of the court below and directing the discharge of the petitioner in error.

III. The said Supreme Court of the State of Alabama erred in refusing to hold that the following grounds upon which the petitioner in error moved the court to discharge him, entitled petitioner to relief, to-wit:

First (1). The evidence introduced fails to prove an intent to injure or defraud the Riverside Co. at the time of entering into the contract.

Second (2). The evidence fails to show an intent to injure or defraud the Riverside Co. at the time of the refusal or failure to perform the services contracted for.

Fourth (4). Said act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no State shall make or enforce any law which will deprive any person of life, liberty or property without due process of law.

Fifth (6). That the said Act is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Sixth (7). That said Act is unconstitutional and void in that its effect is to subject the petitioner to involuntary servitude not as a punishment for a crime, in violation of the Thirteenth Amendment of the Constitution of the United States.

THE STATUTORY OFFENSE.

The statute under which plaintiff in error is detained reads as follows:

> "Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county, and one-half to the party injured.
>
> "*And the refusal of any person who enters into such contract to perform such act or service, or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord or to defraud him.*"

The ingredients of the offense are said in Ex parte Riley, 94 Ala. 82, in McIntosh v. State, 117 Ala. 129, and in State v. Vann, 43 So. Rep. 357, to be—

> "(1) A contract in writing by the accused for the performance of any act or service;
>
> "(2) An intent on the part of the accused, *when he entered into the contract*, to injure or defraud his employer;
>
> "(3) The obtaining by the accused of money or other personal property from such employer by means of such contract entered into with such intent;
>
> "(4) The refusal by the accused, with like intent, and without just cause, and without refunding such money, or paying for such property, to perform such act or service."

The statute did not then extend to farm tenants and landlords, nor had the amendment as to *prima facie* evidence been enacted.

CONSTRUCTION OF STATUTE BY ALABAMA SUPREME COURT.

In Ex parte Riley, 94 Ala. 83, Mr. Justice Walker said:

"The effect of this statute is to provide for the punishment criminally of a certain class of frauds which are perpetrated by means of promises not meant to be kept. These frauds closely resemble those perpetrated by means of false pretenses or tokens. * * * This statute by no means provides that a person who has entered into a written contract for the performance of services * * * is punishable * * * upon his refusal to perform the contract. * * * A mere

breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused *entered into the contract with intent* to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause. That there was an intent to injure or defraud the employer, *both when the contract was entered into and when the accused refused performance*, are facts which must be shown by the evidence. As the intent is the design, purpose, resolve or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inference from the facts and circumstances developed by the proof. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance."

Most of the above is quoted approvingly in the McIntosh and Vann cases.

In McIntosh v. The State, 117 Ala. 130, Mr. Chief Justice Brickell said:—

"*Refunding the money*, or restoring other property, with which the employer, by reason of the contract was induced to part, *is a principal purpose*, the statute is intended to enforce. * * * The rendition of service by the defendant for a period more than sufficient to have repaid the money advanced to him, takes away an essential ingredient of the offense."

In the Vann case it is said that the defendant "cannot be convicted without the fraudulent intent, whether he does or does not repay the money. The gist of the crime is to fraudulently get the money, or property of another, and the statute merely condones the offense by permitting the defendant to repay or refund, and re-

quires the State to negative this fact."

In Harris vs. The State, 47 So. Rep. 340, (June, 1908), a divided court held that where the employe undertook other things in addition to the performance of personal services, the contract is not within the statute. One Justice, concurring, said further that the accused might exculpate himself by refunding the money at any time before trial (perhaps at any time before conviction).

To the statute, as it stood when the Riley and McIntosh cases were decided, three important provisions have been added by amendment, one extending it to include farm tenant and landlord contracts, one making the punishment a fine in double the damage suffered by the injured party, one-half to go to the county and *one-half to the injured party,* and the other making the refusal of the employe or tenant to perform the service or cultivate the land, without just cause, or to refund the money or property obtained, *prima facie* evidence of the intent to injure or defraud.

The third of these provisions was first considered in The State v. Thomas, 144 Ala. 77, in which Mr. Justice Haralson said that, it "simply *declares the intent,* declares a *prima facie* rule of evidence," this view being affirmed in The State v. Vann, 43 So. Rep. 357, and Bailey v. The State, (Not reported). Record page 9.

THE PRACTICAL APPLICATION OF THE STATUTE.

The following illustrations show the practical effect of the statute:

(1) 'A' contracts with 'B' to perform labor for twelve months for wages payable at the end of the term, and thereby obtains money from 'B'. He enters upon

and continues service for six months, when his wife becomes sick and he takes her away for treatment and fails to perform the rest of the services or to return the money obtained. The statute makes these facts *prima facie* evidence of the fraudulent intent of 'A', both when he obtained the money and when he quit the service.

(2) After working for 'B' under such a contract for six months 'A' is sued by a third party and his wages due from 'B' are seized by garnishment. Being without means of sustenance for himself or family, he quits 'B's' service to work for 'X', not able, of course, to refund the money obtained from 'B'. The statute makes these facts *prima facie evidence* of the two fraudulent intents.

(3) 'A' contracts in like manner with 'B' and after six months service is arrested and imprisoned for an offense committed after the date of the contract and thereby prevented from completing the service, and he has not refunded the money obtained. The statute makes these facts *prima facie* evidence of the two fraudulent intents.

(4) 'A', an alien, entering upon his contract in like manner with 'B', is deported by the government before the service is complete and without his refunding the money obtained. The statute makes these facts *prima facie* evidence of the two fraudulent intents.

(5) Six months after entering into the contract and entering upon the service, 'A' is offered a position paying so much more that he can afford, rather than lose the position, to pay whatever damages the employer may recover in a civil action on the breach and for the money obtained, but, being unable presently to repay the money, and determining in his own mind to repay it out of the first wages earned in the new employment, (which he cannot testify), and even promising so to pay his employer, quits the service. The statute makes

these facts *prima facie* evidence of the two fraudulent intents.

(6) 'C,' a woman, contracts with 'B' in like manner and after six months service meets 'D' for the first time, shortly thereafter marries him and goes to 'D's' home in another State without refunding the money originally obtained or completing the service. The statute makes these facts *prima facie* evidence of the two fraudulent intents.

The effect of the words in the statute "without just cause" are considered hereinafter.

PRINCIPLES GOVERNING FEDERAL JURISDICTION.

This statute will be considered according to its real purpose and effect rather than its mere language. This principle was recognized and made effective in the case of Dan Rogers v. State of Alabama, 192 U. S. 226, 48 L. Ed. 417, wherein Mr. Justice Holmes says: "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired."

In Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543, Mr. Justice Miller says: "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." And after discussing the effect of the statute then under consideration—"It is said that the purpose of the Act is to protect the State against the consequences of the flood of pauperism immigrating from Europe, and first landing in that city, (New York). But it is a strange mode of

doing this to tax every passenger alike who comes from abroad. * * * Whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the State."—going to show that on constitutional questions this Court will look to the substance and not the shadow, to the meat and not the shell.

In Cummings v. Missouri, 4 Wall. 325, 18 L. Ed. 363, Mr. Justice Field says:

"The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct (the point there involved), by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

This Court will not ordinarily on writ of error to a State Court declare a State law void on account of collision with the State constitution, and yet it has said, in Jackson v. Lamphire, 3 Peters, 280, 7 L. Ed. 683, that "cases may occur where the provisions of a law on those subjects (statutes of priority of deeds and of limitations) may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court."

CONSTITUTIONAL QUESTIONS IN ALABAMA SUPREME COURT.

The Alabama Supreme Court has considered the constitutionality of the statute as amended in

The State v. Thomas, 144 Ala. 77;
The State v. Vann, 43 So. Rep. 357;
Alonzo Bailey v. The State, Record, p. 7.

No brief was filed for the appellee in The State v. Thomas, and it seems to have been considered on the sole proposition that the legislature may declare what shall be *prima facie* evidence. This point was disposed of in the Vann case with the statement: "The amendment (as to the *prima facie* evidence) is a mere rule of evidence, and has been upheld by this court in the case of State v. Thomas, the soundness of which is not challenged by counsel."

In the case at bar it was again raised and the conclusion reached in the Thomas case affirmed without discussion.

Record page 9.

The other constitutional question raised in the Vann case, whether the statute authorized imprisonment for debt contrary to the Alabama Constitution, is disposed of in the statement of the Court that the statute is intended to prevent fraud, and not to imprison for debt. It is conceded therein that the offense is dependent upon the failure of the accused to refund the money obtained by entering into the contract, but decided that this is merely beneficial to the accused and not a condition of which he can complain because the State is thus compelled to assume the burden of proving the failure to refund. "He cannot be convicted," says the Court, "without the fraudulent intent, whether he does or does not repay the money. The gist of the crime is to fraudulently get the money, or property of another, and the statute merely condones the offense by permitting the defendant to repay or refund, and requires the State to negative this fact."

In the case at bar all of the constitutional questions raised by this record were decided by the trial judge and by the Alabama Supreme Court against plaintiff in error without much discussion in the opinion.

Record pages 5, 7, 12.

THE REAL EFFECT AND OBJECT OF THE STATUTE.

What is the real object of the statute? It must be either to compel the repayment of the money, or to compel the employe to remain in service, or both. Was it meant either to prevent employes from making fraudulent contracts, or to prevent them from obtaining money by promising service? Surely not. The advancing of the money by the employer to the employe is not to be considered as merely a lending transaction. If so, the security would be a mere promise of one of a class well known to be generally without means to pay, and loans to them without acceptable security are seldom made. The statute is not meant to give a lender security for his loan. That would be contrary to common sense and business practices. What, then, is the motive of the employer? If he does not advance the money to obtain interest thereon, it must be to secure the services of the employe. He could generally get a contract for the services without the advance money, but then the employe might quit before the end of the term, which is the thing the employer would prevent. He wants the continuous service of the employe for a definite period. To do this he uses a trap, sanctioned by the legislature and not detected by the Alabama Supreme Court, to compel the service.

The real object of the statute, we submit, is to enable the employer to keep the employe in involuntary servitude by the overhanging menace of prosecution which he knows must be successful on account of the artificial presumption or rule of evidence making the quitting prima facie evidence of the crime.

We do not forget that the Alabama Supreme Court has said that the effect (and, presumably, the object) of the statute is to punish fraud; that a mere breach of

a contract is not made a crime. But it also says that "refunding the money * * * is a principal purpose the statute is intended to enforce," and that "when the money is refunded * * * the employer is saved from injury or loss." It also says, "the rendition of service * * * sufficient to have repaid the money advanced to him, takes away an essential ingredient of the offense." It also says that "the statute purges the offense if the money is repaid. * * * He cannot be convicted without the fraudulent intent whether he does or does not repay." It also says that "to come within the statute, the sole consideration moving from the employe to the employer must be the performance of personal service." It also says "an essential element of the offense * * * was that the employed person abandoned the service *'without first repaying such money.*"

From these excerpts from the opinions in the various cases cited above, can we tell whether the object of the statute is to force the employe to continue in service or to compel him to repay the money? If he quits without paying he is condemned! If he serves to the end of the term without paying, he has committed no offense! If he quits without paying but pays before trial (possibly before conviction) the offense is condoned or purged!

But, be it remembered, the employe has for the money advanced sold his *freedom for the term*, forfeited his *right to quit* the service, while for the agreed wages he has sold his *services*. He cannot redeem that freedom before the end of the term except by repaying the money advanced—he becomes free by serving the full term even without repayment. He is compelled to pay the money he obtained or to perform service sufficient to cancel the debt. See McIntosh case, 117 Ala. 128, at page 130, holding that the employer could retain the wages to sat-

isfy the debt. (Doubtless the contract in the case at bar was drawn to meet that ruling—the money advanced herein being made payable by indirection, $1.25 per month).

If the real object is to prevent such frauds, why was the statute originally aimed at employes, and no one else? Are they an infamous class? Are they less honest than other men—employers, forsooth? And then, why did the amendment extend to no one but tenants of farms? Are they less willing to pay their rent than the occupiers of dwelling or store houses? Why does it not include that innumerable horde who infest store-houses daily and buy goods for which they do not intend to pay? Does not their failure or refusal to pay at the promised time prove their intent to defraud as much as does the act of the employe or tenant which is made *prima facie* evidence of his guilt?

It is all too plain. The purchaser of goods promises *no services*—the employe and the farm tenant promise substantially *nothing but service*. The merchant wants pay for his merchandise, but not service: the employer (hence his designation) *wants the service*, and not the money advanced: it is for the service he pays the wages, but for the *right* to that service for a definite term that he makes the advance.

Then, what is the real object and effect of the statute? Is it to compel *payment* or to enforce *service*? If either, is it valid?

WHY THE AMENDMENT AS TO PRIMA FACIE EVIDENCE?

As considered in the Riley case, the statute provided punishment for obtaining money or other personal property by a promise not meant to be kept. To convict it was necessary to prove a mental status, the existence of

the intent not to fulfil the contract. This is a question of fact for determination by the jury.

"In this State, although differing from the rule declared in some other States, we refuse to allow parties, when testifying in their own causes, to give evidence of their own uncommunicated motives or intentions. * * * The result is, that, with us, motive and intent remain as they were at common law—inferences to be drawn from surrounding facts and circumstances."

Ala. Fer. Co. v. Reynolds & Lee, 79 Ala. 500;
Burke v. The State, 71 Ala. 377;
Whizenant v. The State, 71 Ala. 383;
Brown v. The State, 79 Ala. 51.

While the statute is akin to those against obtaining goods by false pretenses, it is radically different in the difficulty of proof. In the former, proof of the existence *vel non* of the pretense is not inherently difficult—in the latter, proof of the intent of the employe is almost impossible. Before the amendment, shielded by the presumption of innocence, not compelled to incriminate himself, nor permitted to testify to his uncommunicated intent, the accused was in little danger of conviction, whether guilty or not. This is shown by the results of the cases appealed to the Alabama Supreme Court from convictions under the statute before amendment.

The amendment as to *prima facie* evidence was unquestionably meant to change this condition of things. We need no better statement of this than the words of Mr. Justice Denson in the case at bar: "It is no doubt true that the difficulty in proving the intent, made patent by that decision (Riley case) suggested the amendment of 1903 to the statute, which provides that the refusal or failure of a person who enters into such contract, to perform such act or service * * * shall

be *prima facie* evidence of the intent to injure or defraud his employer."

Record page 8.

By indirection and evasion, under authority of the inaccurate and inapplicable statement that "the legislature may declare what shall be *prima facie* evidence" —facts which constitute the mere breach of a civil contract are made *prima facie* evidence of a criminal offense.

Are not the right of trial by jury, the presumption of innocence, the equal protection of the laws, the essentials of due process of law, and the prohibitions against involuntary servitude except for crime, brushed aside by the omnipotent devices of a State Legislature!

Two questions arise: (1) Is the legislature authorized to make rules of evidence violative of constitutional rights, and (2) is this a mere rule of evidence?

THE STATUTE DENIES DUE PROCESS OF LAW.

The Federal Constitution provides that no State shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Alabama Constitution provides that the right of trial by jury shall remain inviolate.

The denial of any one of the essential elements of a jury trial is a denial of the *right* of jury trial. The universal presumption of the innocence of the accused is an element of jury trial and casts upon the State the burden of proving guilt beyond a reasonable doubt. Any legislation infringing, or authorizing the court to infringe, upon the function of the jury is a violation of the right of trial by jury. 24 Cyc. 191, G. If the real effect of a statute in Alabama is to deprive the accused

of any essential element of a jury trial, it is in violation of the Federal Constitution.

This statute denies to plaintiff in error his right to trial by jury because it arbitrarily overcomes the presumption of his innocence and gives him no fair opportunity to rebut the prima facie evidence of his guilt.

The Thomas case, *supra*, upholds the provision as to *prima facie* evidence on the authority of the text in 8 Cyc. 820, as follows: "The legislature has power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings, it may declare what shall be *prima facie* evidence." Like all statements of general rules, this is subject to limitations and restrictions. So, in 8 Cyc. 1090, treating of "Due Process of Law," under the specific head of "Deprivation of Life and Liberty," the rule is more accurately stated—"A state may establish and alter rules of evidence as to what constitutes proof of an offense, *provided the accused is given a fair opportunity to explain and contest the charge, and the rule is not arbitrary in character.*"

Commonwealth v. Wallace, 7 Gray, 222.

Adams v. New York, 192 U. S. 585.

Again the rule is stated in 24 Cyc. 192, "the legislature may provide that proof of certain facts shall be sufficient to establish a *prima facie* case in either criminal or civil cases, *for a prima facie case* does not overcome the presumption of innocence or change the burden of proof, or require the jury to convict unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt. *This rule, however, is subject to the limitation that the fact relied on as establishing the prima facie case must have some fair relation to or connection with the main fact and that the accused must have an opportunity to make his de-*

fense and submit the whole case to the jury; and it is not competent for the legislature to create presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime of which the defendant is accused."

How inadequate, then, is the announcement of the Alabama Supreme Court that the "amendment is a mere rule of evidence," especially when it is admitted in the same opinion that the legislature "cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary."

Doubtless the State will urge in support of the statute the Fong case, 149 U. S. 729, holding that the provision (of the Act of Congress) which puts the burden of proof upon him (the Chinaman), of rebutting the presumption arising from his having no certificate, as well as the requirement of proof by at least one credible white witness that he was a resident of the United States at the time of the passage of this Act " is *within* the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government." But it is pointed out in that case that that proceeding was in no sense a trial and sentence for a crime but the enforcement of a valid regulation of the entrance of aliens into this country, and that *Fong was not, therefore, deprived of life, liberty or property without due process of law.* Fong was an alien. He was seeking to claim the benefits of a privilege, not a right. These requirements were reasonable and not arbitrary. There was no mental status involved. It was always possible for the alien to meet the requirements and if entitled to remain in this country, he had all due opportunity to overcome the *prima facie* or presumptive evidence. Being a Chinaman, the presumption would be that he was

not entitled to remain, and yet he is afforded the means of overcoming the presumption against him. We think the case has no application here, and the statement of the "acknowledged power of every legislature to prescribe rules of evidence" was not meant to be an accurate or final declaration of a rule in criminal cases. And three members of this Honorable Court dissented on this very point.

But we say that the statute is invalid because (1) though *nominally* it declares a *prima facie* rule, it *really* fixes a *conclusive* rule, and (2), if it is only a *prima facie* rule, it is bad because it is arbitrary. The facts made *prima facie* evidence of the intent with which the contract was made has no relation to that intent, those facts are perfectly consistent with his innocence, and the defendant is not afforded a fair opportunity to submit his whole case to the jury.

Let us test the statute by these principles and illustrate it by the case at bar.

By agreeing to work twelve months, Bailey obtained $15, to be repaid by the withholding of $1.25 from his wages each month. If he then and there intended to defraud the Company he violated the statute. That intent was a mental status, which no one could know except himself. Testimony that he had stated at any time that he *did not* intend to perform the service would support a conviction. But testimony that he stated at any time that he *did* intend to perform the service would be incompetent. He is presumed, in the beginning, to be innocent. But after a month and four days work, for reasons not disclosed by the record, but admitted to be without just cause, and without refunding the money he had obtained, he ceased to work. Instantly, in spite of the continuing presumption of innocence, there is *created* by this legislative rule,

primá facie evidence that he intended to defraud his employer, not only when he ceased to work, but when he made the contract and obtained the money. By an act which occurred more than a month afterward, the original transaction, then apparently, and, perhaps, actually, legal and moral, is converted into an illegal, immoral and criminal act. The intent with which the original transaction was made is thus ascertained or determined by an act occurring a month later, an act not in itself criminal, and having no logical connection with that intent. Without the statute there is no evidence even tending to show fraud; with the statute the evidence is conclusive of fraud, because defendant's lips are sealed by the law of Alabama and there is no way to overcome the *prima facie* evidence.

If he had worked six months the effect would have been the same. How an act not related by cause and effect or in any other logical manner, can be made *prima facie* evidence of the character of an intent existing sixth months before, (the defendant having no opportunity to declare his intent) without violating the right of trial by jury is beyond our comprehension. The Riley and McIntosh cases show that the Alabama Supreme Court considered such evidence would not support a conviction, when unaided by the *prima facie* evidence created by the statute.

For the manifest purpose of making convictions possible, easy, even certain, the legislature arbitrarily undertook to give the facts a weight they did not naturally, inherently or judicially possess. It made them conclusive for all practical purposes.

It must have intended to make them conclusive, for it would have been a vain thing to make them merely *prima facie*, unless this would secure convictions. If the *prima facie* evidence would not overcome the pre-

sumption of innocence, it would not relieve the condition, but if it did, and the defendant could not rebut that evidence (as he cannot in Alabama because he cannot testify to his intent) the result would be inevitable —the defendant would be convicted.

Mr. Justice White, in Coffin v. United States, 156 U. S. 453, says: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. * * * The presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

But this statute singles out a fact not of itself tending to show fraud and makes it the instrument to overcome this fundamental presumption which is itself proof of innocence until the jury is satisfied beyond reasonable doubt of his guilt.

In the case at bar as well as the Thomas and Vann cases, the *prima facie* evidence was treated as overcoming the presumption of innocence and supporting conviction.

In Kelly v. Jackson, 6 Peters 622, 8 L. Ed. 523, it is said that *prima facie* evidence "is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. * * * In a legal sense, then, such *prima facie* evidence in the absence of all controlling evidence, or discrediting circumstances, becomes *conclusive of the fact.*"

Statutes have been held valid which make the possession of stolen goods, burglars' tools, gambling paraphernalia, policy slips and intoxicating liquors in certain cases, *prima facie* evidence of crime, because there

is a logical connection between these things and the offense, and evidence is possible and admissible to rebut the *prima facie* case. Adam's case, 192 U. S. 585. A mental status is not the issue, and the defendant may explain his possession of the articles, by his own testimony, though he may not declare his specific intent in reference thereto.

It may be that the statute would declare a valid rule if limited to cases where the defendant made a contract for *immediate* service and immediately refused to enter upon it, for *that* refusal might support an inference as to the specific intent, the time of making the contract and the time of refusal being practically the same.

If there are no limitations on the power of the legislatures to fix rules of evidence, they may emasculate all constitutional rights. For what more arbitrary rule of evidence could be made than that involved here?

But it may be said that the Alabama Supreme Court has held that the statute does secure the right of trial by jury, and this Court is bound by its decision. See Jackson v. Lampshire, 3 Peters, 280, quoted on page 11 hereof.

But, be it so:—then, what shall be said when it appears that no other class of offenders in Alabama is deprived of the benefit of the presumption of innocence, equivalent to one witness in behalf of the defendant, by an artificial rule of evidence, by which an inconsequential act is arbitrarily made to prove (in effect) his guilt? Then all we have said under this head finds a fitting place under the discussion of "equal protection of the laws."

B. & P. S. Co. v. Randolph, 119 Ala. 510-11.
Yick Wo v. Hopkins, 118 U. S. 356, 374.

THE STATUTE VOID FOR UNCERTAINTY.

Three times in the statute appear the words "and without just cause." What do they mean? To what word are they grammatically related? Does the phrase refer to the repayment, refunding or restoration of property, or to the refusal or failure to perform the stipulated service? No just causes for non-payment occur to us except payment or satisfaction by counter-claim, equivalent to payment. It can hardly mean that. Does it refer to the refusal or failure to perform the service? The only just causes for refusing to perform the service are those things done by one of the parties recognized by the law of contracts as authorizing a termination by the other. If these are meant, the statute may be sufficiently certain in its terms to be valid.

But if the phrase is meant to leave it to the court or jury to decide what facts or circumstances are just cause for the refusal or failure of the accused to repay the money or to perform the service, the statute is void for violating a cardinal requirement of criminal statutes —that of certainty.

The legislature may not delegate to judge or jury the power to supply an essential element to the statute where it has fixed no rule or guide therefor.

"A statute (creating an offense not existing at common law) must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty." 12 Cyc. 142.

United States v. Reese, 92 U. S. 214.

If the statute is not void for uncertainty, these words "without just cause" still work its destruction for reasons which are discussed herein under the head of "Involuntary Servitude." If it is void, conviction there under must be without due process of law, and the statute subject to the consideration of this Court.

EQUAL PROTECTION OF THE LAWS.

Does the statute not deny to plaintiff in error the equal protection of the laws? The contract between him and the Riverside Company imposes on the employe the obligation to work for the employer and to repay the money advanced to him, and on the employer the obligation to pay the employe his wages each month. Where farm tenants are concerned, the landlord frequently obligates himself also to furnish "rations," fertilizers, live stock, peaceable possession and other things. For breaches of those obligations the law affords ample remedy to each. By appropriate actions the employe may collect his wages, and the employer his advances and damages for the failure of the employe to perform the services. The legislature of Alabama was evidently not content with this equality before the law.

But in such cases there can be no decree for specific performance and no civil action to secure the actual personal services of the employe.

Does not the statute give to the employer an advantage which is denied the employe? While it does not expressly authorize punishment of the employe for not performing the service, it does provide that he may be punished if he made the contract and obtained the advance money with intent not to perform the service. There is no corresponding provision for punishing the employer if he entered into the contract and thereby secured the services of the employe with intent not to pay therefor. This might be a theoretical matter under the statute as it stood before amendment, for conviction was then well-nigh impossible. But aided by the amendment prescribing the *prima facie* evidence, it gives the employer an unconscionable advantage. It enables him to resort to, or hold over the employe the menace of, a

criminal prosecution (which both know must be successful), thus coercing the employe to perform the service or to refund the money advanced. It does not give the employe a corresponding remedy to compel the employer to pay the wages. As to the farm tenant and landlord, in the same way it enables the landlord to force the tenant to cultivate the land and perform the service contracted for, without giving the tenant an equal remedy to compel the landlord to comply with his lease contract which may contain many stipulations—such as furnishing rations, seed, fertilizers, live stock, peaceable possession to the end of the term, etc.

These burdens are placed upon and limited to classes contracting to perform service. In Harris case, 47 So. Rep. 340, the Alabama Supreme Court expressly states that "this is a criminal statute, *aimed solely at those who enter into contracts to perform personal service.*" If equal and exact justice—"the equal protection of the laws"—was the aim of the legislature, why did it not lay the corresponding burdens on the employer and the landlord? Where is the equal protection of the laws in this condition of things?

In the Peonage Cases, 123 Fed. 671, is a very able and exhaustive treatment of this statute, by Judge Thomas G. Jones, District Judge for the Middle District of Alabama. Any attempt on our part to discuss it would be only a mutilation of most persuasive language. We may say, however, that, in charging the grand jury he evidently assumed the validity of the original statute because the statute was not before him for construction.

Ex parte Hallman, 60 S. E. Rep. (So. Car.) 20.

The Alabama Labor Contract Statute of Mar. 1, 1901, (Acts 1900-1, p. 1208) was held to be unconstitutional as violative of the right to equal protection of the laws, in an able opinion by Mr. Justice Sharp, (Toney v. The

State, 141 Ala. 120). He cites and quotes from some of the leading decisions of this Court. Therein he thus refers to the words "without sufficient excuse" as used in that statute as the words "without just cause" are used in that under consideration herein, "the existence of an excuse for the abandonment to be judged of by the court could never be known to be available except at the risk of, and at the end of, a criminal prosecution."

Let what we have said under the head of "due process" be considered in this connection.

Joseph v. Randolph, 71 Ala. 499.

INVOLUNTARY SERVITUDE.

The statute plainly and flagrantly violates the Thirteenth Amendment to the Federal Constitution.

We stop to quote two expressions used by the Alabama Supreme Court in considering this statute. In the McIntosh case, 117 Ala. 128, Mr. Chief Justice Brickell said, "*Refunding the money* * * * is a principal purpose the statute is intended to enforce." In the Vann case, 43 So. Rep. 357, Mr. Justice Anderson said, "The gist of the crime is to fraudulently get the money or property of another, and the statute merely *condones the offense by permitting the defendant to repay or refund.*"

The penalty is a fine in double the amount of damage suffered by the injured party, not to exceed $300. If the limit may be placed at $300, why can it not, in principle, be placed at $3,000, or any other sum, not unreasonable?

The Alabama Supreme Court has condemned a statute prescribing a punishment of this kind in the case of Carr v. The State, 106 Ala. 35, holding that it authorized imprisonment for debt. While we cannot object to the statute under consideration on that specific ground, in

terms, yet if it sanctions imprisonment for debt it authorizes a form of involuntary servitude and is obnoxious to the Federal Constitution.

Mr. Justice McClellan said in that case: "This statute cannot be read without conviction that its purpose is to impose imprisonment for debt, and to coerce the payment of a debt by the duress it authorizes. Its requirement that the fine shall be paid only in money, that it shall be double the amount of the deposit, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit, tends, at least, to show that coercion of payment of the debt which the depositary owed the depositor—for the transaction created the relation of debtor and creditor between them—by means of the restraint which the imposition of the fine itself immediately put upon the defendant—not to speak here of his imprisonment preliminary to the trial—and, that failing to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of the enactment of the statute. And what doubts on this point might have been left, had the statute stopped here, are removed beyond peradventure by its further provision that payment to the depositor at any time before conviction, "shall be a good and lawful defense to any prosecution under this act." There cannot be two opinions as to the intent and meaning, or the effect upon the whole enactment, of this last and most remarkable provision. It is a declaration of the baldest and most direct character to one party to a transaction whereby he has incurred a debt to the other, in the name of the State, that unless he pays that debt, he shall be arrested, held to trial, tried, convicted, fined and imprisoned at hard labor, and this obviously not for any taint of crim-

inality in the transaction out of which the debt arose, but purely and simply for the non-payment of the debt. For this default, and until it is purged either by simply paying the debt and accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and the expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for taking the deposit, if the preliminary imprisonment shall have the desired effect of extorting the money he owes the depositor out of him, and if, as is the case here, the compulsion of preliminary imprisonment fails of its intended effect, he may, under the guise of punishing an act which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminality or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of the debt, be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction. There can, in our opinion, be no sort of doubt that this enactment is violative of the constitutional provision, and therefore void."

There can be no imprisonment for debt in Alabama, even though it originated in fraud. In this respect its Constitution differs from many others.

Ex parte Hardy, 68 Ala. 303.

While the contract involved in the case at bar may not be void for uncertainty, if the statute enables the employer to enforce involuntary servitude by the em-

ploye, the statute is invalid and there can be no conviction under it.

"Involuntary servitude" includes all forms of compulsory service for the benefit or pleasure of others.

Slaughter House Cases, 16 Wall. 36.
Civil Rights Case, 109 U. S. 3.
Clyatt v. United States, 197 U. S. 207.

By this statute the employe is made to perform compulsory or involuntary service from the moment he desires to quit the service and is deterred therefrom by the menaces of the statute. What are the menaces of the statute? The first is the certainty of conviction because of the rule making the quitting *prima facie* evidence of crime. The second is the prospect of imprisonment before trial, even if he have a "just cause" for quitting the service, because the "just cause" of the statute is a vague and indefinite thing and he must take the risk of a correct prediction as to whether what he thinks a just cause will be held to be so by the judge and jury. For fear of making a mistake as to his "just cause" for quitting, he remains in the service under duress. The statute does not define the "just cause" and no one can foretell what conclusion may be reached by different judges or juries from the same state of facts. Mr. Justice Sharp, in Toney v. The State, 141 Ala. 125, says "the existence of an excuse for the abandonment to be judged of by the court could never be known to be available, except at the risk of, and at the end of, a criminal prosecution."

Central, &c., Ry. Co. v. R. R. Com. 161 Fed. 925.
See Ex parte Young, 209 U. S. 123.

Every man has the legal right to quit a personal service contract if he is willing to pay the civil penalties. Criminal penalties may not be lawfully added to secure the service, for, as stated by Judge Cooley in his work

on Torts, "It is the part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."

In Ex parte Drayton, 153 Fed. 986, is an able opinion by Judge Brawley which states our views so much better than we could hope to do that we do not even attempt to give a synopsis of it, but we urge its careful consideration. The Alabama statute is quoted on page 993 of the opinion as it stood when the Riley case was decided, and before any of the amendments discussed herein were added to the statute.

On cases of involuntary servitude, see, also,

In re Thompson, 117 Mo. 83;
In re Turner, 24 Fed. Cases No. 14247; 1 Abb. 84;
In re Clark, 1 Blackf. (Ind.) 122.

CONCLUDING CONSIDERATIONS.

The Court takes judicial knowledge of the official report of the United States census. That shows a population in Alabama in 1900 of 1,828,697 of whom 827,307 were colored. 1,304,703 were over ten years old. Of these over 500,000 were engaged in agricultural service, out of a total of about 750,000 in all gainful occupations.

In addition to the statute under consiedration, and in spite of the declared invalidity of the Act of 1901 referred to above in Toney v. The State, 141 Ala. 125, the present Code of Alabama contains the following statutes:—

"And person who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, or attempts to hire, employ, entice away, or induce to leave the service of another, any laborer or ser-

vant, renter, or share-cropper, who has contracted in writing to serve such other person for any given time, not to exceed one year, before the expiration of the time so contracted for, or who knowingly interferes with, hires, entices away, or induces any minor to leave the service of any person to whom such service is lawfully due, without the consent of the party employing, or to whom such service is due, given in writing, or in presence of some credible person, must, on conviction, be fined not less than fifty nor more than five hundred dollars, at the discretion of the jury, *and in no case less than double the damages sustained by the party whom such laborer or servant was induced to leave; one-half to the party sustaining such damage*, and the other half to the county."

"When any laborer or servant, renter, or share-cropper, having contracted as provided in the preceding section, is afterwards found in the service or employment of another before the termination of such contract, that fact is prima facie evidence that such person is guilty of a violation of that section, if he fail and refuse to forthwith discharge such laborer or servant, after having been notified and informed of such former contract or employment."

"Any person who employs any immigant, or otherwise entices him from his employer, in violation of the contract of such immigrant, must, on conviction, *be fined in a sum not less than the amount of wages for the unexpired term of the contract*, and may be imprisoned in the county jail, or sentenced to hard labor for the county, at the discretion of the jury, for not more than three months."

Code of Alabama, 6850, 6851, 6854.

All of these statutes may well be viewed as a system meant to give to a dominant class undue and unequal

powers over a great army of less fortunate citizens who eat their daily bread in the sweat of their face, and who by reason of their weak and defenseless condition should rather be the especial objects of the law's protection. Negro slavery has passed away, but if a system of peonage of white and black shall arise in its stead, the last estate shall be worse than the first, for the only limitation upon the masters will be their want of wealth and power, both of which will be augmented by the system they support.

In Clark's case, 1 Blackford 122, 12 Amer. Dec. 213, we read:—

"Deplorable indeed, would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service the exercise of such a right would be most alarming in its consequences. If a man contracting to labor for another *a day, a month, a year, or a series of years*, were liable to be taken by his adversary and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other. We may, therefore, unhesitatingly conclude that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary in fact or in law."

In the words of an apt quotation used by Judge Cooley:—"Not only he who *feels*, but he who is *exposed to*, tyranny, is without freedom."

The age of these statutes is no reason, of course, for their continuance, if invalid. It will be remembered that Chief Justice Holt was the first to lay down a doctrine that required fifty years to fully establish in England in the case of Somersett by Lord Mansfield. Holt, C. J., had said: "Trover does not lie for a black more than for a white man. By the common law no man can have a property in another man, except in special cases, as a *villein*, or a captive taken in war, but in England there is no such thing as a slave, and a human being never was considered a chattel to be sold for a price, and, when wrongfully seized, to have a value put upon him in *damages by a jury* like an ox or an ass."

3 Keble, 685;
1 Lord Raym. 146;
2 Lord Raym. 1275;
Salk, 666.

When Somersett, the slave from Jamaica confined on board ship in the river Thames, made his claim for freedom by *habeas corpus* to Lord Mansfield, the Chief Justice said: "I care not for the supposed *dicta* of Judges, however eminent, if they be contrary to all principle (he was referring to the opinions of Lord Talbot and Lord Hardwicke cited by counsel). At any rate villeinage has ceased in England and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered, and whatever may be the color of his skin. *Quamvis ille niger, quamvis tu candidus esses.* Let the negro be discharged."

See 20 St. Tr. 1-82.
The of Chief Justices of Eng. III. 156, IV. p. 134.

If the statute here assailed be upheld, will not the practical effect be to legalize and establish a condition of involuntary servitude and virtual peonage—a condition that world-wide civilization and enlightenment has condemned as utterly destructive of the best elements of manhood in both servant and master?

Respectfully submitted,

Fred S. Ball

For Plaintiff in Error.

BAILEY *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 538. Submitted November 12, 1908.—Decided December 21, 1908.

This court cannot require the state court to release persons held for trial because the evidence fails to show probable cause, and in this case the judgment of the highest court of the State dismissing a writ of *habeas corpus* is affirmed without consideration of the questions on the merit and the constitutionality of the state statutes under which the accused was held although such questions were discussed by the state court.

Quære and not decided, whether the statutes of Alabama involved in this case establish a system of peonage in violation of the Constitution and laws of the United States.

THE facts are stated in the opinion.

Mr. Fred S. Ball and *Mr. Edw. S. Watts*, for plaintiff in error.

Mr. Alexander M. Garber, Attorney General of the State of Alabama, and *Mr. Thomas W. Martin*, for defendant in error.

By leave of court, *Mr. Attorney General Bonaparte* and *Mr. Robert A. Howard* filed a brief as *amici curiæ* on the question of constitutionality of the Alabama statute.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to reverse a judgment of the Supreme

Court of the State of Alabama, affirming a judgment of a judge of the Montgomery City Court, which denied a discharge on *habeas corpus* to the plaintiff in error. At the hearing on the writ in the City Court it appeared that after a preliminary trial before a justice of the peace the plaintiff in error was committed for detention on a charge of obtaining fifteen dollars under a contract in writing, with intent to injure or defraud his employer. At this stage the writ was issued.

If the Supreme Court had affirmed the denial of the discharge on the ground that the proper course was to raise the objections relied upon at the trial of the principal case on the merits and to take the question up by writ of error, it would have adopted the rule that prevails in this court and there would be nothing to be said. But the Supreme Court of the State dealt with the objections, and, as the matter is one of local procedure, it is not to be criticised for taking a different course. The unsatisfactoriness of such attempts to take a short cut will appear, however, we think, in a moment.

We gather from the opinion of the Supreme Court that the plaintiff in error is proceeded against under a law of 1907 (General Acts, 1907, p. 636), amending the Code of 1896, § 4730. This section of the Code made it an offense punishable like larceny to enter into a contract in writing for service with intent to injure or defraud the employer, and, after thereby obtaining money or personal property from such employer, with such intent, without just cause and without refunding the money or paying for the property to refuse to perform the service. The amendment, embodying and enlarging an earlier one, makes the refusal or failure without just cause *prima facie* evidence of the intent; makes the penalty a fine in double the damage suffered, one-half to go to the party injured, and creates a similar offense with regard to persons making contracts in writing "for the rent of land." It is contended that the statute as it now stands is unconstitutional under the Thirteenth and Fourteenth Amendments. The presumption is said to be artificial and not drawn from the facts of life.

When coupled with the local rule that the party cannot testify to his actual intent, it is said practically to make a crime out of a mere departure from service, which it is said, and it seems to have been conceded by the Supreme Court of Alabama, could not be done.

The trouble in dealing with this contention is due to the meager facts on which this case comes before us at this stage. If the principal case had been tried it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events, including the consequences in case of inability to pay the fines, was such that in view of its operation and intent the whole statute ought to be held void. It may be, although presumptions of intent from somewhat remote subsequent conduct are not unknown to the common law, *Commonwealth* v. *Rubin*, 165 Massachusetts, 453, that the amendment creates a presumption that cannot be upheld. But we cannot deal with these questions now. All that appears from the record with regard to the foundation of the case against him is that the plaintiff in error is held on a charge of having obtained money under a written contract with intent to defraud. There is no doubt that such conduct may be made a crime. It may be questioned whether we ought to assume that the proceeding is under the statute, although it is admitted on all hands. But if we do assume it, there is nothing as yet to show that the section of the Code apart from the amendments is bad. The amendments are separable, as is sufficiently shown by the fact that the rest of the enactment originally stood without them. When the case comes to trial it may be that the prosecution will not rely upon the statutory presumption but will exhibit satisfactory proof of a fraudulent scheme, so that the validity of the addition to the statute will not come into question at all. It is true that it appears that the plaintiff in error was held for trial on the statutory evidence and with no other proof of fraudulent intent. But if that evidence was insufficient it hardly will be contended that this court should require the state courts to

release all persons held for trial, where in its opinion the evidence fails to show probable cause. We repeat, the trouble with the whole case is that it is brought here prematurely by an attempt to take a short cut. And as the Supreme Court of the State would have been warranted in denying the writ on that ground, perhaps we have done a work of supererogation in giving further reasons for affirming its judgment.

Judgment affirmed.

MR. JUSTICE HARLAN, dissenting.

The plaintiff in error, Bailey, was arrested and held for trial on the charge of having obtained from his employer with the intent to injure him the sum of fifteen dollars. Having been taken into custody he sued out a writ of *habeas corpus* from a subordinate court of Alabama, alleging that the statute under which he was arrested and deprived of his liberty was in violation of the Constitution of the United States.

The statute of Alabama referred to is as follows: "§ 6845 of Alabama Code of 1907, p. 522, c. 211.—Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be

punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured. And the refusal of any person who enters into such contract to perform such act or service, or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be *prima facie* evidence of the intent to injure his employer or landlord or to defraud him."

It appears that at the hearing of the application for *habeas corpus* the accused contended that the statute was in violation (1) of the Fourteenth Amendment of the Constitution of the United States in that it deprived him of his liberty without due process of law and denied him the equal protection of the laws; (2) of the Thirteenth Amendment, in that its effect was to subject him to involuntary servitude (not as a punishment for crime) if he failed to pay a debt preferred against him.

These contentions were overruled and the discharge of the accused having been refused he prosecuted an appeal to the Supreme Court of Alabama. That court considered upon its merits every question presented by the record, and affirmed the order under which the accused was held in custody. From that order the case was brought here by Bailey from that court upon writ of error granted by its Chief Justice.

Speaking generally, the statute has been assailed by the accused, as well as by the Attorney General of the United States (who, with the consent of this court, has filed a brief as *amicus curiæ*), as establishing and maintaining and as intended to establish and maintain, as to laborers or employés in Alabama, a system of peonage in violation of the Constitution and the laws of the United States. The statute of Alabama, the Attorney General contends, is in violation of the act of Congress of March 2, 1867, c. 187, now § 1990, Rev. Stat., which provides that "all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or any other Territory or State, . . . by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or

indirectly, the voluntary or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, are declared null and void." 14 Stat. 546.

The Supreme Court of Alabama, by its final order, overruled the objections which the accused urged, on constitutional grounds, against the statute and refused to direct his discharge from custody. If that statute is repugnant to the Constitution and laws of the United States it is void, and the accused is deprived of his liberty in violation of Federal law. That every one will admit. But this court refuses, although the case is before it upon writ of error regularly sued out by the defendant, to consider and determine that question. It affirms the judgment of the state court and leaves the accused in custody upon the ground—if I correctly interpret the opinion—that he took a "short cut" when seeking, upon *habeas corpus*, to be discharged from custody in advance of his trial. If the accused, in advance of his trial, had sought a discharge on a writ of *habeas corpus* sued out from *a Circuit Court of the United States*, that might have been deemed a "short cut." For it is well established that "in the light of the relations existing under our system of government between the judicial tribunals of the Union and the State, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," the courts of the United States will not, except in certain cases of urgency, and in advance of his trial, discharge upon *habeas corpus* one who is alleged to be held in custody by the State in violation of the Constitution or the laws of the United States. *Ex parte Royall*, 117 U. S. 241, 248, 249; *Minnesota* v. *Brundage*, 180 U. S. 499, 501, *and the authorities there cited*. But whether the accused, in seeking his discharge by the state court, adopted a mode of procedure authorized by the local law was for the Alabama courts, not for this court, to determine. The state court recognized the proceeding by *habeas corpus* to be in accordance with the local law; for, the Supreme Court of Ala-

bama, without even intimating that the accused took a "short cut," or pursued the wrong method to obtain his discharge, entertained his appeal and passed upon the constitutionality of the statute under which he was held in custody. As the state court by its final order held that the detention of the accused by the state authorities was not inconsistent with any privilege secured by the Constitution or laws of the United States, he was entitled, *of right*, to bring the case here upon writ of error and have this court determine the question, distinctly raised, whether the statute of Alabama, as applied to his case, did not infringe privileges belonging to him under the Constitution and laws of the United States. We say, of right, because § 709, Rev. Stat., expressly authorizes a writ of error to reëxamine the final judgment of the highest court of a State, which denies a title, right, privilege or immunity, specially set up or claimed under the United States. This is a right of great value. I submit that this court cannot properly refuse or fail to meet the constitutional question decided by the state court and plainly raised by the present writ of error for its consideration. Such refusal or failure cannot, I submit, be justified except on the ground that an order of the highest court of a State rendered on a formal appeal which affirms that the accused is not held in custody in violation of the Constitution and laws of the United States, is not a *final judgment* within the meaning of § 709—a proposition which this court does not announce and which, I cannot believe, it will ever announce. The course pursued in the disposition of this case by the court has not, so far as I am aware, any precedent in its history. If it was the right and duty of the state court to determne by its final order whether the accused was constitutionally deprived of his liberty or was subjected to involuntary servitude or labor, not in punishment for crime, but really in liquidation of a debt, it is then the right, and, I think, the duty of this court, upon the present writ of error, regularly brought by the accused, to reëxamine that judgment and decide the question whether he is deprived of his liberty

in violation of the Constitution or laws of the United States. It is a curious condition of things if this court must remain silent when the question comes before it regularly, whether the final judgment of the highest court of a State does not deprive the citizen of rights secured to him by the Supreme Law of the Land.

For the reasons stated I dissent from the opinion and judgment of the court.

MR. JUSTICE DAY also dissented.